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133-375

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~264~~ 30

THE QUEBEC STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

vs.

BARBARA MERCHANT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 1, 1886.

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1 *Affidavit of Service.*

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

U. S. Supreme Court.

THE QUEBEC STEAMSHIP COMPANY, Pl'ffs in Error,
against
BARBARA MERCHANT, Def't in Error.

William H. Wilson, Jr., being duly sworn, says he is a clerk in the office of Butler, Stillman & Hubbard, attorneys for the pl'ffs in error herein; that on the 8th day of March, 1886, at number — 6th street, Hunter's Point, L. I., *in said city*, he served the annexed writ on Barbara Merchant; deponent made such service by delivering a copy of the same to and leaving the same with her personally, at the same time exhibiting to her the signature.

WILLIAM H. WILSON, Jr.

Sworn to before me this 10th day of March, 1886.

[Seal Daniel A. O'Connell, Notary Public, New York Co.]

DANIEL A. O'CONNELL,
Notary Public, N. Y. Co.

2 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Barbara Merchant, plaintiff, and The Quebec Steamship Company, defendant, a manifest error hath happened, to the great damage of the said The Quebec Steamship Company, as is said and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 25th day of February, in

the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
N. Y., Feb. 25, 1886.

WM. J. WALLACE.

3 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from four to one hundred and five, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of The Quebec Steamship Company, plaintiff in error, against Barbara Merchant, defendant in error, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

[Endorsed:] I hereby admit due personal service this day upon the defendant in error, Barbara Merchant, & upon me, as her attorney, of a copy of the within writ of error. N. Y., Feb. 26, 1886. A. J. Dittenhoefer, att'y for pl'ff, Barbara Merchant. U. S. circuit court. Filed Mar. 10, 1886. Timothy Griffith, clerk.

4 [L. S.] The people of the State of New York, by the grace of God free and independent, to all whom these presents shall come, Greeting:

Know ye that we, having inspected the files of the superior court of the city of New York, do find there remaining on file a certain record and the proceedings (a copy of the whole of which said record and the proceedings is hereto annexed) in an action wherein Barbara Merchant is plaintiff and Quebec Steamship Co. is defendant, in the words and figures following, to wit:

5 *Affidavit of Merits.*

CITY AND COUNTY OF NEW YORK, *ss:*

New York Superior Court.

BARBARA MERCHANT, Plaintiff,
against
THE QUEBEC STEAMSHIP COMPANY, Defendant.

A. E. Outerbridge, being duly sworn, doth depose and say that he is one of the firm of A. E. Outerbridge and Co., agents of the defendant herein: that he has fully and fairly stated the case in the above action to Wilhelemns Mynders, defendant's counsel in this action, who resides at 46 Garden Place, in the city of Brooklyn, and that the defendant has a good and substantial defense upon the merits thereof, as he is advised by its said counsel after such statement made as aforesaid and verily believes — to be true; that the reason why this verification is not made by the defendant is that it is a foreign corporation, none of whose officers are now within this country or State or within 100 miles thereof.

A. E. OUTERBRIDGE.

Sworn to before me this 23rd day of April, 1884.

C. S. SIMPSON,
Notary Public, N. Y. Co.

6 (Endorsed:) New York superior court. Barbara Merchant against The Quebec Steamship Company. Affidavit of merits. Butler, Stillman, Hubbard, attorneys for defendant, 111 Broadway, N. Y.

Please take notice that an affidavit of merits, of which the within is a copy, was this day filed with the clerk of this court.

Yours, &c., BUTLER, STILLMAN, HUBBARD,
Attorneys for Defendant.

New York, 187.
To pl'ff's attorney.

Filed April 23, 1884.

7 Superior Court. Trial Term.

BARBARA MERCHANT *vs.* QUEBEC STEAMSHIP COMPANY.

A. J. Dittenhoefer, for pl'ff; Butler, Stillman, Hubbard, for def't.
Issue of law & fact.
To be tried by a jury.
Noticed for 1st Monday of June, 1884.
Date of issue, April 24, 1884.
Answer received May 16th, 1884.

(Endorsed:) 1946. N. Y. superior court. Barbara Merchant *vs.* Quebec Steamship Company. Note of issue.

8 *Calendar of Issues of Fact to be Tried by a Jury.*

Superior Court of the City of New York. June Term, 1884.

Disposition of cause, p. 3.
Number: 1946.
Former number: —.
Parties: Barbara Merchant *vs.* Quebec Steamship Co.
Date of issue: Apr'l 24, 1884.
Attorneys: A. J. Dittenhoefer; Butler, Stillman & Co.

9 *Part III. Before Judge Geo. L. Ingraham. Day Calendar for Thursday June 5th*, 1884.

Superior Court. Trial Term.

2 Monday. 1946. Barbara Merchant — The Quebec Steamship Co. A. J. Dittenhoefer; Butler, S. & Co.

10 Superior Court of the City of New York.

BARBARA MERCHANT *vs.* QUEBEC STEAMSHIP COMPANY.

To the superior court of the city of New York:

The petition of Barbara Merchant, the plaintiff in this action, respectfully shows to this court—

That the above-entitled action is an action at law now pending in this court; that the summons and complaint were served on the 4th day of April, 1884; that this action is brought to recover the sum of twenty-five thousand dollars, damages sustained by the plaintiff, your petitioner, through the neglect of the defendant; that the complainant alleges that the defendant is a
11 foreign corporation created under the laws of Canada and a common carrier, and as such carrier owned and controlled a steamship known as the "Bermuda," on board of which vessel your petitioner was stewardess; that on the 28th of December, 1883, through the negligence of defendant, your petitioner while on board of said vessel received severe injuries, to her damage in the sum of twenty-five thousand dollars, for which sum judgment is demanded; that the defendant served its answer on the 16th day of May, 1884, denying that your petitioner was injured through the negligence of defendant, but averring that such injury occurred through the negligence of a fellow-servant of your petitioner or that her own negligence contributed thereto, and denies
12 that your petitioner sustained damages as alleged in the complaint.

That the matter in dispute in this action is the said sum of twenty-five thousand dollars, which said matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the plaintiff, Barbara Merchant, was at the time of the commencement of this action, ever since has been, and now is a citizen

of the State of New York, and the defendant, Quebec Steamship Company, was at the time of the commencement of this action, ever since has been, and now is a foreign citizen, namely, a citizen of the Dominion of Canada.

That this action can be fully and fairly tried and deter-
13 mined by the circuit court of the United States for the southern district of New York, in the second circuit.

That your petitioner has made and is about to and herewith does file a bond, with good and sufficient surety, for her entering in such circuit court of the United States, to be held in the district where this action is pending, to wit, in the southern district
14 of New York, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court if said court shall hold that this action was wrongfully or improperly removed thereto, and also for her appearing and entering special bail in this action, if special bail was originally requisite therein, pursuant to the statute in such case made and provided.

Your petitioner further shows that this action has not yet been tried, and this petition and said bond are presented and filed and this application is made at the term at which this cause could be first tried in this court.

Your petitioner therefore prays that this action may be removed for trial into the circuit court of the United States for the southern district of New York (in which said district this action is now pending), pursuant to the provisions of the statue in such cases made and provided, and that this court proceeded no further in said action.

No previous application for the order or relief now asked for has been made to any other court or judge.

BARBARA MERCHANT.

15 A. J. DITTENHOEFER,
Attorney for Plaintiff (Petitioner).

Office and post-office address: 71 Broadway, New York city.

STATE OF NEW YORK, }
County of New York, } ss:

Barbara Merchant, being duly sworn, says that she is the plaintiff in the above-entitled action and the petitioner named in the foregoing petition; that she has read the foregoing petition and knows the contents thereof; that the facts stated in said petition are true to the knowledge of deponent, except as to the matter therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

BARBARA MERCHANT.

Sworn before me this 25th day of June, 1884.

[L. S.] A. A. CAULDWELL,
Notary Public, N. Y. Co.

16 (Endorsed:) N. Y. superior court. Barbara Merchant, plaintiff, against Quebec Steamship Co., defendant. Petition. Removal. A. J. Dittenhoefer, att'y for plaintiff, 71 Broadway, New York. To —— ——, attorney for —— ——. Due service of a copy of the within is hereby admitted. Dated ——. Filed June 26, 1884. —— ——, att'y for —— ——. Ordered to be filed June 26, 1884. Jno. Sedgwick, judge.

17 Know all men by these presents that we, Barbara Merchant, now residing at Long Island City, in the State of New York, and Jonas Sonneborn, of No. 333 West 58th St., in the city, county, and State of New York, surety, are held and firmly bound unto Quebec Steamship Company and its successors in the penal sum of five hundred dollars, lawful money of the United States; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Given under our hands and seals this 25th day of June, 1884.

The conditions of this obligation are these: The said Barbara Merchant being about to and having applied now to the superior court of the city of New York to remove a certain action now pending in said court, wherein the said Barbara Merchant is plaintiff, and the said Quebec Steamship Co. is defendant, from the said superior court of the city of New York to the circuit court of the United States for the southern district of New York:

Now, therefore, if the said Barbara Merchant shall enter in
18 the said circuit court of the U. S. for the southern district of New York, on the first day of its next session, a copy of the record in said action or suit, and shall pay all the costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said circuit court in such suit if special bail was originally requisite therein, then this obligation shall be void; otherwise to remain in full force and effect.

BARBARA MERCHANT.
JONAS SONNEBORN.

19 STATE OF NEW YORK, }
City and County of New York, } ss:

Jonas Sonneborn, being duly sworn, says that he is the surety named in the foregoing bond, and that he is a resident and householder in the State of New York, and is worth double the amou-t specified in the foregoing bond over and above all debts and liabilities which he owes or has incur-ed and exclusive of property exempt by law from levy and sale under an execution.

JONAS SONNEBORN.

Sworn to before me, June 25th, 1884.

[L. S.] A. A. CAULDWELL,
Notary Public, N. Y. Co.

STATE OF NEW YORK, } ss:
City and County of New York, }

On this 25th day of June, 1884, before me personally came Barbara Merchant and Jonas Sonneborn, to me personally known, and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

20 [L. S.]

A. A. CAULDWELL,
Notary Public, N. Y. Co.

21 [Endorsed:] N. Y. superior c't. Barbar- Merchant, plaintiff, against Quebec Steamship Co., defendant. Bond on removal to U. S. circuit court. A. J. Dittenhoefer, att'y for pl'ff, 71 B'way, New York. To —— ——, attorney for —— ——. Due service of a copy of the within is hereby admitted. Dated ——. Filed June 26, 1884. —— ——, attorney for —— ——. Within bond is hereby approved and ordered to be filed. Dated June 26, 1884. Jno. Sedgwick, judge.

22 All which we have caused by these presents to be exempli-ed and the seal of the superior court of the city of New York to be hereunto affixed.

Witness John Sedgwick, Esquire, chief and presiding judge of our said court, at the city hall of the city of New York, this 27th day of June, A. D. 1884.

THOMAS BOESE, *Clerk.*

Superior Court of the City of New York.

BARBARA MERCHANT *against* QUEBEC STEAMSHIP CO.

—, John Sedgwick, presiding judge of the superior court of the city of New York, do hereby certify that Thomas Boese, whose name is subscribed to the preceding exemplification, is the clerk of the superior court, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the said exemplification is the seal of the said superior court of the city of New York, and that the attestation thereof is in due form of law.

Dated New York, June 27th, 1884.

JNO. SEDGWICK,
Chief and Presiding Judge of the Superior Court of the City of New York.

23 STATE OF NEW YORK, } ss:
City and County of New York, }

I, Thomas Boese, clerk of the superior court of the city of New York, do hereby certify that John Sedgwick, whose name is subscribed to the preceding certificate, is the chief and presiding judge of the superior court of the city of New York, duly elected and

sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court this 27th day of June, 1884.

[L. S.] THOMAS BOESE, *Clerk.*

[Endorsed:] New York superior court. Barbara Merchant against Quebec Steamship Com-any. Exempli-ed copy of record. U. S. circuit court. Filed June 27, 1884. Timothy Griffith, clerk.

24 *Summons.*

Superior Court of the City of New York.

BARBARA MERCHANT, Plaintiff,

against

QUEBEC STEAMSHIP COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgement will be taken against you by default for the relief demanded in the complaint.

Dated New York, April 1st, 1884.

A. J. DITTENHOEFER,
Pl'ff's Attorney.

Office or post-office address: No. 291 Broadway, New York city.

25 Superior Court of the City of New York.

BARBARA MERCHANT *vs.* QUEBEC STEAMSHIP Co.

The plaintiff, complaining of the defendant, alleges as follows, on information and belief:

First. That at all the times hereinafter mentioned the defendant was and still is a foreign corporation, created under and by virtue of the laws of the Dominion of Canada, carrying on the business of a common carrier of passengers and freight by water.

Second. That the said defendant, in *their* said business as such common carrier, was the owner and had control of a line of steamers plying between this State and West Indies, and, among others, the steamship known as the "Bermuda," of which vessel the plaintiff was stewardess, in the employ of the defendant.

Third. That on the 28th day of December, 1883, the plaintiff, while lawfully on board of said vessel "Bermuda" and while in the discharge of her duties as stewardess as aforesaid, fell from the deck of said vessel into the water, severely injuring herself,
26 solely because of the defendant's negligence in wrongfully, improperly, and negligently fastening the railing or guard around said vessel.

Fourth. That said accident occurred through the negligence of the defendant and without any fault or neglect on the part of the plaintiff.

Fifth. That by said accident plaintiff was severely bruised and injured and confined to her bed for several weeks and is still confined to her room, suffering great bodily and mental pain, and since said time she has been and still is unable to attend to her business, and was compelled to and did expend a large sum of money for medical attendance and medicines, and will be compelled to incur expense for future attendance and medicines.

Sixth. That by reason of the premises plaintiff has sustained damages in the sum of twenty-five thousand dollars.

Wherefore plaintiff demands judgement against the defendant for the said sum of twenty-five thousand dollars, besides the costs and disbursements of this action.

A. J. DITTENHOEFER,
Attorney for Plaintiff.

Office address: 291 B'way, New York city.

27 LONG ISLAND CITY, } ss:
County of Queens, }

Barbara Merchant, being duly sworn, says that she is the plaintiff herein and knows the contents of the foregoing complaint; that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

BARBARA MERCHANT.

Sworn to before me this 29th day of March, 1884.
H. H. RASSALYEA,
Notary Public, Queens Co.

28 [Endorsed:] New York superior c't. Barbara Merchant, plaintiff, against Quebec Steamship Co., defendant. Summons and complaint. A. J. Dittenhoefer, att'y for plaintiff, 291 B'way, New York. To ——, attorney for ——. Due service of a copy of the within is hereby admitted. Dated ——. ——, attorney for ——. U. S. circuit court. Filed June 27, 1884. Timothy Griffith, clerk.

29 Superior Court of the City of New York.

BARBARA MERCHANT, Plaintiff,
against
QUEBEC STEAMSHIP COMPANY, Defendant.

The defendant above named, by Butler, Stillman & Hubbard, its attorneys, answers the complaint of the above-named plaintiff as follows:

First. The defendant admits that at all the times mentioned in the complaint it was and still is a corporation, created under and

by virtue of the laws of the Dominion of Canada, carrying on the business of a common carrier of passengers and freight by water.

Second. The defendant admits that it was the owner and
30 had control of a line of steamers plying between the city of New York and the West Indies, and that the steamship "Bermuda" was one of the steamers of that line, and that the plaintiff was employed upon said steamship "Bermuda" by the defendant as stewardess.

Third. The defendant, upon information and belief, admits that on the 28th day of December, 1883, the plaintiff fell from the deck of said vessel into the water, and that she sustained injuries thereby.

Fourth. Defendant denies each and every other allegation in said complaint contained.

Fifth. For a further, separate, and distinct defence to the
31 matters and things in said complaint set forth the defendant, upon information and belief, avers that the fall of said plaintiff and the injuries sustained thereby were due solely to her own negligence or the negligence of her fellow-servants, or that her own negligence contributed thereto.

Wherefore the defendant demands that the complaint be dismissed with costs.

BUTLER, STILLMAN & HUBBARD,
Defendant's Attorneys.

CITY AND COUNTY OF NEW YORK, *ss:*

A. Emilius Outerbridge, being duly sworn, deposes and says that he is one of the firm of A. E. Outerbridge & Company, agents in New York of the defendant; that he has made the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters stated to be alleged upon
32 information and belief, and as to those matters he believes it to be true; that deponent's information is derived from a careful inquiry made into the facts attending the matters set forth in the complaint and reports made to him by the officers of said steamship, and that he believes the enquiry to have been thorough and the reports true, and that his belief as to the matters set forth in said answer is based upon such information; that the principal office of the defendant is in Quebec, and that its officers there reside, and that none of them are now within this county or State or within one hundred miles thereof. Wherefore this verification is made by deponent instead of one of the officers of the defendant
33 Deponent further says the defense of this action is directed and authorized by the defendant.

A. EMILIUS OUTERBRIDGE.

Sworn to before me this 16th day of May, 1884.

JOHN LARKIN,
Notary Public, Kings Co.

Cert. in N. Y. Co.

(Endorsed:) Superior court of the city of New York. Barbara Merchant ag'st Quebec Steamship Company. Copy. Answer. Butler, Stillman & Hubbard, att'ys for def't, 111 Broadway, N. Y.

34 U. S. Circuit Court, Southern District of New York.

BARBARA MERCHANT, Plaintiff,

against

THE QUEBEC STEAMSHIP COMPANY, Defendant.

You will please enter our appearance in this action as attorneys for the defendant.

Yours, &c.,

BUTLER, STILLMAN & HUBBARD,

Defendant's Attorney-.

N. Y., July 8th, 1884.

To Timothy Griffith, Esq., clerk U. S. circuit court, S. D. of N. Y

35 [Endorsed:] U. S. circuit court, S. D. of N. Y. Barbara Merchant, plaintiff, *vs.* The Quebec Steamship Company, defendant. Notice of appearance. Butler, Stillman & Hubbard, def't's attorney-. U. S. circuit court. Filed Jul. 8, 1884. Timothy Griffith, clerk.

35½ United States Circuit Court, Southern District of New York.

BARBARA MERCHANT *vs.* QUEBEC STEAMSHIP COMPANY.

This action having been originally commenced in the supreme court of the city of New York and having been regularly removed therefrom into this court by the filing of a bond and petition for such removal, pursuant to the statute in such case made and provided, and the plaintiff having this day duly entered and filed an exemplified copy of the record in this cause in this court, and the said plaintiff appearing in this court by A. J. Dittenhoefer, her attorney, it is, on motion of said plaintiff's attorney, ordered that this action proceed in this court as if originally commenced herein by original process, and that the clerk of this court enter the appearance of the plaintiff herein by A. J. Dittenhoefer, her attorney.

Dated June 27, 1884.

A. J. DITTENHOEFER,

Plaintiff's Attorney.

36 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York on Tuesday, the tenth day of February, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Alfred C. Coxe, sitting as circuit judge.

BARBARA MERCHANT *vs.* THE QUEBEC STEAMSHIP COMPANY.

Now comes the plaintiff, by A. J. Dittenhoefer, Esq., her attorney, and moves the trial of this cause; likewise comes the defendant, by Butler, Stillman & Hubbard, its attorneys. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evi-

dence of the parties, the argument of counsel, and the instructions of the court, the jury retire, and on their return render a verdict, whereby they find for the plaintiff in the amount of five thousand dollars.

37 On motion of counsel for defendant, it is ordered that defendant have a stay of all proceedings on said verdict pending argument of and decision on the motion for a new trial herein.

A copy.

TIMOTHY GRIFFITH, *Clerk.*

H. H. M.

38 At a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 3rd day of February, 1886.

Present: Hon. Alfred C. Coxe, judge.

BARBARA MERCHANT *vs.* THE QUEBEC STEAMSHIP COMPANY.

The issues in this action having come on to be tried before Hon. Alfred C. Coxe, judge of this court, and a jury, and the jury having, on the 11th day of February, 1885, rendered a verdict in favor of the plaintiff and against the defendant for the sum of $5,000, and the defendant h-ing thereupon moved, on the minutes of the judge, for a new trial on the ground that the verdict is against the weight of evidence and contrary to law, and the court having entertained the motion, and after hearing William Allen Butler, Esq., of
39 counsel for the defendant, in support of the motion, and A. J. Dittenhoefer, Esq., of counsel for the plaintiff, in opposition thereto—now, on motion of A. J. Dittenhoefer, attorney for the plaintiff, it is—

Ordered that said motion be, and the same hereby is, denied, on condition that the plaintiff enter judgment against the defendant for the sum of $5,000, the amount of the verdict rendered by the jury, together with interest thereon from the date of rendition of said verdict, and the cost of this action.

ALFRED C. COXE.

Notice of settlement of this order waived.

BUTLER, STILLMAN & HUBBARD.

Endorsed: U. S. circuit court, southern district of N. Y. Barbara Merchant, plaintiff, ag'st The Quebec Steamship Co., defendant. Order. A. J. Dittenhoefer, att'y for pl'ff, 71 B'way, N. Y. U. S. circuit court. Filed Feb'y 3, 1886. Timothy Griffith, clerk.

40 United States Circuit Court, Southern District of New York.

BARBARA MERCHANT *vs.* QUEBEC STEAMSHIP CO.

The issue in this action having come on to be tried before Hon. Alfred C. Coxe, judge of this court, and a jury, and the jury having, on the 11th day of February, 1885, rendered a verdict in favor of

the plaintiff and against the defendant for the sum of five thousand dollars, and the defendant having moved on the minutes of the judge for a new trial on the ground that the verdict is against the weight of evidence and contrary to law, and an order having thereafter been duly entered on the 3rd day of February, 1886, denying the said motion for the said new trial on condition that the plaintiff enter judgment herein against the said defendant for the amount of the verdict, with interest thereon from the rendition of s'd verdict, besides the costs of this action, and the costs having been duly taxed at the sum of sixty and $\frac{25}{100}$ dollars ($60.25), on motion of A. J. Dittenhoefer, plaintiff's —, it is adjudged that the plaintiff,

Barbara Merchant, recover of the defendant, The Quebec
41 Steamship Company, the sum of five thousand dollars ($5,000), the amount of the damages awarded by the jury; three hundred and six dollars ($306), interest thereon from the date of the rendition of the verdict of the said jury, together with sixty and $\frac{25}{100}$ dollars ($60.25) costs; in all, the sum of five thousand three hundred and sixty-six and $\frac{25}{100}$ dollars ($5,366.25).

Judgment signed this 20th day of February, A. D. 1886.

JOHN A. SHIELDS,
Deputy Clerk.

42 [Endorsed:] United States circuit court, southern district of New York. Barbara Merchant, plaintiff, against Quebec Steamship Company, defendant. Original judgment. A. J. Dittenhoefer, att'y for plaintiff, 71 Broadway, N. Y. To —— ——, att'y for —— ——. Due service of a copy of the within is hereby admitted. Dated ——. —— ——, att'y for —— ——. U. S. circuit court. Filed Feb. 20, 1886, 2 p. m. Timothy Griffith, clerk.

(Here follows diagram marked p. 43.)

44 It is hereby consented and agreed that this plan be inserted in the record, to be transmitted in the case of Merchant *v.* Quebec S. S. Co. to the Supreme Court instead of the original plan.

N. Y., Feb. 27th, 1886.

A. J. DITTENHOEFER, *Pl'ff's Att'y.*
BUTLER, STILLMAN & HUBBARD,
Def't's Att'ys.

45 Circuit Court of the United States for the Southern District of New York.

BARBARA MERCHANT, Plaintiff,
against
THE QUEBEC STEAMSHIP COMPANY, Defendant.

And now, on this day, to wit, the 10th day of February, 1885, before the Honorable Alfred C. Coxe and a jury, at a circuit court held in the city of New York, in said southern district of New York, came as well the said defendant and its attorneys and counsel as the

said plaintiff and her attorney and counsel, and the jurors, being called, likewise came, and after being elected, tried, and sworn to try the issues joined in this action, the plaintiff, to maintain and prove the issues on her part, produced and called the following evidence and witnesses, to wit:

BARBARA MERCHANT, plaintiff, who testified:

I reside on Seventh street, Long Island City. I am a widow, and have been such for seven or eight years. My husband's name was Alexander Merchant. He died July 7th, 1877, in Glasgow, Scotland. I have not been married since. My occupation since the death of my husband has generally been that of a stewardess. I was four
46 years and a half stewardess on the National Line; I was on that line four months, and after that I joined the West Indies Line. I was about eighteen months in their employ when I was hurt. The West India Line is the Quebec Steamship Line. I was stewardess on the "Bermuda," a steamship belonging to that Company. It plied between New York and eight West India ports. I was on the "Bermuda" as stewardess about eighteen months. An accident occurred to me on the "Bermuda," while we lay off one of the ports of Spain—Trinidad. On the 28th of December, 1883, we arrived, as near as I can tell, at four o'clock in the evening and the accident occurred to me somewheres about five. The steamers did not run up to the port at Trinidad; they anchored off some distance from the port and the passengers were carried by row-boats, or little boats, from the steamer to the port. On this 28th day of December the "Bermuda" lay off the port. Some passengers by the name of Harrison had been taken off from the steamer by this little boat into the port on that day. They had been taken off the steamer and rowed into the port. As stewardess my duty was to look after the ladies, attend to all their wants, see that their rooms were always in perfect order, and after they were gone to take charge of all the soiled and unclean linen.

47 Q. And it was your duty to empty the slops?

A. Yes, sir; belonging to any lady's room.

Q. What were your orders in that regard, as to emptying this refuse?

A. To put nothing but water in any of the bath-rooms; anything else, throw over the side.

Q. In the discharge of that duty, were you doing anything on the day at the time this accident occurred?

A. Yes, sir; I was attending to——

Q. Please state slowly what you were doing.

A. I was stripping the linen in the ladies' rooms; also emptying slops.

Q. Please state what you did when this accident occurred.

A. I took a pail of slops out, which was filled with torn envelopes and orange peeling. When I looked into the pail I says, that won't do to put that down the bath-room. When I met with the accident I had stripped the linen from the ladies' beds, and it is my duty to empty all slops belonging to ladies' rooms. When I went to

empty this slop there was torn-up envelopes and orange peeling in the pail, and we were allowed to throw nothing down the bath-room but water, so, of course, I threw it over the side, as it was a usual thing for me to do.

Q. Please state when you got hold of these pails containing slop where you were.

A. I was in the ladies' room.

Q. When you got this pailful of slops what did you do?

A. I stepped out in a small passage, and from there there is a door goes out and faces this railing. When I went out with the slops and fell overboard I both felt and seen the rails go with me.

48 Q. You went with these slops in the direction of the rail, and in throwing the slops over the rail the rail went and you went with it?

A. Yes, sir.

Q. (Showing witness a paper marked "Plaintiff's Exhibit No. 1 for identification.) Look at this diagram, if you please, Mrs. Merchant. Will you show to the court on this diagram where you were—where you came from with that pail?

A. I was in this (indicating on diagram) room towards the aft part of the ship. I stepped out of this small passage-way here (indicating), and out that door against these rails.

The paper shown to witness is offered in evidence and marked Plaintiff's Exhibit No. 1, of this date.

Q. After falling overboard what do you remember. What were you conscious of when you fell?

A. I knew I was going, and there was a small boat lying underneath.

Q. Did you see that small boat?

A. Yes, sir; and it flashed across my memory if I could only get over that boat I might have a chance for my life.

Q. Did you fall through that opening where those rails were?

A. I did; yes, sir.

Q. How long were you in the water?

A. That I cannot say.

Q. What do you remember occurring, if anything, when you were in the water—hearing or seeing?

A. The first thing I could remember after coming to my senses was a man by the name of John Conway spoke to — and said: "Stewardess, don't grab me."

Q. Did you hear that when you were in the water?

A. Yes, sir.

Q. Did you recognize the voice?

A. Yes, sir; I recognized the voice.

49 By a juror:

Q. Did the rail stanchion go?

A. No, sir; I believe not; I only saw the rails go.

By plaintiff's counsel:

Q. What was the condition of the rail as you saw it?
A. The rails were there.
Q. How were they?
A. They appeared to be all right; I didn't go up and examine them.
Q. But as you glanced at them they appeared to you all right?
A. Yes, sir.
Q. They appeared to be in proper position?
A. Yes, sir; as far as I could see.
Q. Now, after hearing the voice after you were in the water, what is the next thing you recollect?
A. I recollect them taking me in a small boat and pulling me in, but I can't say who it was exactly, because there was three or four there; among them a negro or two.
Q. Of course, you don't remember how long you were in the water?
A. No, sir; I do not.
Q. When they took you out—when do you recollect anything after taking you out of the water?
A. I recollect all.
Q. State what occurred, then, after they took you out of the water.
A. They got me into the small boat and took me and carried me, three or four of them, but I can't say who they were; among
50 them was the chief steward of the ship. Mr. Devoe was chief steward and Mr. Burns the chief engineer. I was helped to bed, and they sent for a doctor, and a colored doctor came from Trinidad. He told them to put ice bandages on my knee. I don't remember the name of the doctor. I cannot remember whether in falling forward I struck the boat or not. Bandages were applied to my knee. No other doctor was called in then until we got to St. Lucius. I remained in bed all the while. I had to because I was so hurt I couldn't do anything for myself. I could move, but it was very painful. When I got to St. Lucius another doctor was called—a white doctor; I do not know his name. He ordered liniment for my knee and gave me some medicine to take inwardly. From St. Lucius we went to Martinique, and the non to New York. During all the voyage I was confined to bed. It was about sixteen days from the day I was hurt until we reached New York. Then I was taken home in a carriage. The chief steward took me home to Long Island City. Dr. James Day attended me and prescribed for me—prescribed a liniment which I am still using. I did not leave my bed until about the end of April; was obliged to remain in bed during that time on account of the injury. I could hardly move myself. I still suffer much pain; cannot work as I did before; injury has left me with a limp. I didn't limp before this accident occurred. There had been no injury or defect in my knee. My left knee was injured by this accident. I had never had any injury or any defect in any limb before. I cannot go down-stairs properly without hopping down; going upstairs I can do a little better.

51 I still suffer pain. I have two children—one nine and one thirteen years of age—who are dependent on me for support. I have been unable to do any work since this accident occurred—none at all. My compensation as stewardess was sixteen dollars a month, but then it was the perquisites and not my wages that made me money. My perquisites amounted to as much as wages, and I had my board free and my sleeping accommodations free. My children are living with my mother, in Long Island City.

Q. Now, how far, Mrs. Merchant, is the distance from where you enter the deck from the passage-way to that railing?

A. I cannot say.

Q. Describe it. Say you were sitting on that chair (witness box) and this is the railing, about how far would it be?

A. It is about two feet, I should think.

Q. What sort of day was it?

A. It was raining.

Q. Bright or dark?

A. Dark day.

Q. And in December, in the neighborhood of five o'clock, you say?

A. Yes, sir.

Q. The way you went, was that the nearest and proper way to go to empty that pail of slops?

A. Yes, sir.

Q. By whom were you employed?

A. By the steamship company. I have paid some money to
52 the doctor and he has rendered me bills. The exact amount I do not remember, or the amount I paid for medicines.

Cross-examined by defendant's counsel:

Q. Do I understand you to say that those three rails all had left their places?

A. The four rails left their places.

Q. There were four rails that left their places?

A. Yes, sir.

Q. Are you certain of that?

A. I am certain; I seen the rails go and felt them.

Q. You saw all four rails go when you were in the act of falling?

A. That I could not say; I seen the rails go and felt them.

Q. How many did you see go?

A. It was done so quick I could not notice.

Q. Then you don't know whether the fourth one or whether only the top rail went?

A. Oh, there was more than one rail.

Q. That you are sure of?

A. I am; more than one; I didn't notice, but there was more than one rail went, I know.

Q. Did you attempt to save yourself?

A. I tried to save myself as much as I could.

53 Q. What did you do with that object; can you remember?

A. The rails went; I went in head first; I thought there would be a chance of my life if I got over this small boat.

Q. Do you remember doing anything to prevent tumbling overboard?

A. I couldn't do anything.

Q. Well, you don't remember doing anything, do you?

A. I didn't have any chance.

Q. Why didn't you have a chance?

A. Because it went away so quick.

Q. Do you think that if you didn't have chance enough to try to save yourself that you had a chance to count the rails that flew loose?

A. No, sir.

Q. You didn't have that chance?

A. No, sir; I didn't have a chance to save myself, it went so quick.

Q. You say you didn't have a chance to save yourself because you went so quick; do you mean to say to this jury that you had a chance to count those rails that were loose?

A. No, sir; but I could see that there was more than one rail.

Q. How did you see that?

A. It flew outward.

Q. And while you were in the act of falling you saw there were more than one of these rails that flew outward?

A. Yes, sir; but I can't say how many; there were more than one.

Q. Do you remember which you observed first—the presence of the small boat or the flying out of the rails?

A. I seen the rails go out.

Q. Which did you observe first—the rails or the small boat?

A. Of course, the rails.

Q. That is what you saw first?

54 A. Yes, sir.

Q. You are not confusing what you saw with what you felt; did you feel the rails or see them?

A. I felt the rails and saw them, both.

Q. Now, this small boat was directly under these rails, I understand?

A. Yes, sir.

Q. And that you noticed?

A. Yes, sir.

Q. The impression went through your mind that if you went clear of that boat there would be a chance for your life?

A. Yes, sir.

Q. Do you know whether you hit the boat or not?

A. That I can't say.

Q. Do you know whether you struck the water first; don't you remember which you struck—whether you struck the boat or the water?

A. No, sir.

Q. This colored doctor that came on board that prescribed ice bandages; did I understand you right?

A. Yes, sir.

Q. How long did you follow that treatment of your knee—of ice bandages?

A. Until I got a change.

Q. What do you mean by a change?

A. Until I got a change of doctors at St. Lucius.

Q. Then you discontinued, didn't you?

A. Yes, sir.

Q. Why did you discontinue it?

A. Because this other doctor ordered a liniment for me.

Q. How many days was that that you were using these ice bandages on your knee?

A. Well, I should judge about three or four days.

Q. Did you keep it constantly bandaged with ice?

55 A. Well, as constantly as I could in the place I was in.

Q. You say this was about five o'clock, December, and in Trinidad?

A. Yes, sir.

Q. How light was it?

A. Well, I should judge, what it was last night about five o'clock—dull day.

Q. You could see without any difficulty the rail, could you?

A. Oh, yes, sir; I could see.

Q. And see objects at a distance?

A. No, not very far; it was hazy and dull; to look toward the shore was hazy and dull.

Q. How long had you been on this steamer; eighteen months, I understood you to say?

A. About eighteen months.

Q. And this place was perfectly familiar to you?

A. I don't ever remember seeing that place opened before. I think that was a new place made, because the ship was altered that voyage.

Q. Are you certain about that?

A. I am not certain.

Q. What makes you think the ship had been altered there at that place?

A. That I don't know.

Q. You just said you thought it had been altered; what makes you think it had been altered?

A. I heard it said that that new gangway had been put there to let foot passengers off along the forward part of the ship.

Q. When did you hear that said?

A. Some time that trip.

Q. Do you mean to be understood as saying that this same arrangement hadn't been there all the time you had been on that ship?

A. That I could not say.

Q. Hadn't you observed it before that day?

A. Never observed that place open before that.

Q. Had you observed it could be opened?

56 A. No, sir; I never observed that it could be opened.

Q. Had you never seen it open?

A. No, sir; I don't remember ever seeing it open.
Q. Did you say something about discharging a family that day?
A. Yes, sir; a family by the name of Harrison, and their baggage was put through there that day.
Q. Did you see it?
A. Yes, sir; I seen the baggage going through.
Q. Then you had seen this before?
A. Oh, yes; I had seen it that day.
Q. You knew the opening was there?
A. Yes, sir.
Q. You knew these hooks were there?
A. Yes, sir.
Q. You saw how it opened?
A. Yes, sir.
Q. Had you never noticed it until that day?
A. I never noticed it really until that day when I seen the baggage going out, because I had never seen it put out there.
Q. Had you never emptied slops there?
A. Yes, sir; all voyages.
Q. All voyages?
A. Yes, sir; all voyages.
Q. Do you mean to say that, although you emptied slops right in that spot, you went directly to that spot voyage after voyage and didn't notice those bars?
A. No, sir; the ship was altered that voyage and the gangways were put on deck.
Q. That voyage, day after day, you emptied slops there?
A. Yes, sir; when I needed to go.
Q. How often did you need to go?
A. Twice a day.
Q. Then twice a day you emptied the slops right in this particular place?
57 A. No, sir; not unless there was something that wouldn't go down the closet.
Q. How often?
A. Maybe every day; I can't remember.
Q. Then maybe every day you emptied slops at that particular place?
A. Yes; when need be; when I couldn't put it down the closet I often went there.
Q. And you never had noticed that these bars there were bars that would open until you saw that baggage removed?
A. No, sir.
Q. When people went off that ship at these ports they went in small boats from the ship, didn't they?
A. Yes, sir; all passengers did.
Q. Well, you have seen them often disembark from the ship, have you not?
A. Yes, sir.
Q. Now, let me see if I can refresh your memory a little; didn't they always go from this gangway into the small boats?

A. No, sir.

Q. Isn't that the gangway where the ladder was put down to enable them to get into the small boat?

A. No, sir.

Q. Where was that gangway?

A. Forwards; towards the middle of the ship.

Q. And then this was the usual place where people disembark, you say?

A. No; I never had seen any one disembark from there.

Q. I don't mean the gangway; when they disembark by means of a ladder and a small boat, I ask you if this wasn't the place where they always went to get into the small boat?

A. No, sir; they went forward.

Q. How did this place differ from the one forward—wider or narrower?

A. I can't say; I never examined.

58 Q. Had you never seen it?

A. I had seen it.

Q. Had you never seen it open when you were getting on?

A. I never noticed. I had seen it, but I never noticed particularly whether it was the same width or not.

Q. Now, when you came to New York I suppose you didn't stay on the steamer all the time?

A. No, sir.

Q. This aperture was quite well aft on the steamer—this place in the rail?

A. It was in the aft part of the ship.

Q. Wasn't that the place from which the gangway was always used that led to the dock when that steamer was in port?

A. Yes, sir.

Q. Hasn't that always been the case?

A. No; I don't remember it; not the place I went through.

Q. The place you went through? I ask you if that was not the place that was always used when that steamer lay in this port for the gangway to pass down from the ship to the dock?

A. No, sir.

Q. You never had seen it so used in this port?

A. No, sir.

Q. Now, tell me who it was that told you that this ship had been altered so recently.

A. I cannot remember.

Q. Can you remember distinctly that it was on that trip?

A. It must have been that trip, because that was the first trip that the ship was altered.

Q. You say it must have been that trip?

A. It must have been that trip.

Q. You say now it was the first trip that the ship was altered; do you mean the rail or the cabins?

A. The cabins were altered.

Q. I don't understand you now that that rail had been altered, do I?

A. I heard some one say that that railing had been altered so that the passengers could come up aft and the steerage passengers forward.

Q. How long were these railings?

A. I can't tell you.

Q. I suppose you signed shipping articles, did you not?

A. I signed my name to a book; yes, sir.

Q. Didn't you sign shipping articles?

A. I believed them to be shipping articles.

Q. And you signed them as shipping articles?

A. Yes, sir.

Q. You have participated in salvage given to this ship, haven't you?

A. Yes.

59 Q. You think between the rail and door was only two feet?

A. As near as I can tell; I never measured it.

Q. Now, when you went to empty these slops, did you lean against this rail?

A. I had to lean there; I had to lift the pail up.

Q. Was there any need of you emptying it over the rail?

A. Yes, sir; I couldn't put it through the rail.

Q. How wide apart are those rails?

A. Not wide enough for a pail to go through.

Q. I would like to know how high that rail was.

A. Just about that height. (Witness indicates the height by comparing with her height).

Q. Please stand up.

A. Just about that height, as near as I can tell you (indicates).

Q. Well, there were four of those rails. Was there any objection to emptying those slops through those rails?

A. I couldn't get the pail through those rails.

Q. Only the slops wanted to go overboard.

A. I couldn't get the pail through the rails.

Q. You could empty the slops through the rails, couldn't you?

A. Yes; but it would get against the ship's side, wouldn't it? You must keep the slops away from against the side of the ship.

Q. You say you couldn't lift that pail without leaning against the rail?

A. Oh, no; I could stand back, but I had to go up there to throw it; I was sure to come against the rail when I threw it.

Q. Which shoulder?

A. Throw that way (indicating); right shoulder.

Redirect by plaintiff's counsel:

Q. Please state whether while you were in the water you had any sensation as to anything having occurred to you.

60 A. The first thing I remember?

Q. Yes.

A. Well, the sensation I had when I came to my senses was that my leg had been taken off, because there were lots of sharks.

Q. Was that while you were in the water?
A. That is while I was in the water; yes, sir.
Q. (Showing witness a small model of rails). Now, look at this. Is that about the way in which those rails and that opening was formed on the ship?
A. As near as I can tell; it looks very like it.
Q. When in order they were fastened in these hooks?
A. They ought to be fastened in those hooks properly.

By the COURT:

Q. State how you went up against the rail.
A. I stepped out of the door and went against the rail with the slops, and they seemed to fly up (witness indicates).
Q. One end?
A. One end; yes, sir.
The COURT: Do you maintain that this is an improper construction?
PLAINTIFF'S COUNSEL: No.

By plaintiff's counsel:

61 Q. What was the appearance of those rails when you went to empty that pail?
A. They seemed all right.
Q. In their places?
A. They seemed to be in their places; I didn't go out and feel them.

Recross by defendant's counsel:

Q. You say they seemed to be in their places?
A. As far as I could see.
Q. Didn't you see?
A. As far as I could see.
Q. (Repeated.) Didn't you see?
A. I didn't go up and examine them.
Q. You say they were all right as far as you could see?
A. Yes, sir.
Q. What do you mean; did you look?
A. I didn't go and look; I didn't go to examine them; I saw the rails were there.
Q. You didn't know how they were fastened at all?
A. No, sir; I did not.
Q. Now, if you didn't notice how they were fastened, how are you able to say they were in position?
A. I don't swear that they were in that position.
Q. Do you mean to say that you didn't fall over that top rail?
A. I would have had to climb up to fall over there.
Q. You didn't fall over that?
A. No, sir; I didn't fall over that.
Q. And the second rail was about how high to your body? Stand up and let us know how high the second rail was from the top, to the best of your recollection.

62 A. I know where the top rail is, but I don't know the second; I don't know how wide they were apart.

Q. Were they equally distant one from the other?

A. They seemed to be equal distant.

Q. Then if it was four feet, it would be about a foot apart?

A. If it was four feet it would be.

Q. Now, can you give me an idea how high that second rail was on your body—the first rail from the top?

A. I cannot say exact, but I will give you as near as I can; the top one was about that (indicating on her body); the second I should think about there (indicating).

Redirect by plaintiff's counsel:

Q. The other side of the vessel had rails in that way, did it not?

A. I believe so.

Q. It looked all alike?

A. It looked all the same to me.

By defendant's counsel:

Q. Were there three or four of these openings along that side of the vessel?

A. I don't know; there was one wide opening where the cargo was taken on board, and then I don't remember any opening only where the passengers went down by the gangway.

Q. That made three?

A. That made three.

Q. You don't remember any other?

A. No, sir; not in the forward part of the ship.

Q. How long a time before this accident happened to you had these passengers been let off?

A. We arrived about four o'clock, and I think they had been let off about a quarter to four.

Q. And the baggage went through that opening?

A. Yes, sir.

63 *Deposition of John Conway, Taken Before Trial.*

JOHN CONWAY, being duly sworn and examined, says:

Direct examination by plaintiff's counsel:

My name is John Conway, and am thirty years of age, and reside in the city of New York. I am employed as fireman's messmate on board steamship Puebla of Alexander's line, which vessel is now lying at Pier 3, North river, and is advertised to sail to-day at 3 o'clock, and is bound for Havana and Mexico. I intend going with her to-day as such fireman's messmate, to be gone about one month.

I was employed on the 28th of December, 1883, by the Quebec Steamship Company, on board of the vessel Bermuda. I was on board said vessel Bermuda on the 28th of December, 1883, employed as waiter. In the afternoon of that day she had come to anchor off Trinidad, about two miles from shore.

I know the plaintiff, Mrs. Merchant, being slightly acquainted with her, being on board the Bermuda with her.

On the afternoon of December 28, 1883, between four and five, we came to port—dropped anchor; it was raining. The baggage of the Harrisons, passengers, was taken off the vessel. There is a railing around the entire vessel, consisting of four iron bars supported by stanchions about two feet and a half apart. To make an opening the four rails are raised, being fastened on one side by two rings hanging loose, in which the bars swing, and on the other end of the bar is a hook which goes into an eye.

Q. (Paper shown witness marked Plaintiff's Exhibit I for identification.) Is this a correct representation of the gangway which
64 you have described, through which the Harrison baggage went?

A. Yes, sir; I think it is.

Q. Did the plaintiff fall overboard on that day?

A. Yes, sir; through the opening through which the Harrison baggage was taken.

Q. Is this gangway or opening, as represented on Plaintiff's Exhibit I for identification, the one through which plaintiff fell?

A. Yes, sir.

Q. Prior to plaintiff's falling overboard state just what occurred in regard to this rail or opening.

A. I was standing in the room to the right of the railing or opening, forward of the gangway, and Mrs. Merchant was in the room aft of this gangway. I stood looking out of the window, laughing at the carpenter and porter, West, trying to fix the rails or bars at this gangway. The Harrison baggage had been taken out by this time. They were trying to fix those rails in the proper position. The rails had been down to let the baggage off, and they were trying to put them up again. West was at one stanchion, pushing forward, while the carpenter stood at the other, where the hook fitted into the eye, trying to force it into the eye. It began raining, and the carpenter and West were beginning to get wet. I heard the carpenter and West speaking.

Q. State what was said by them.

A. The carpenter said: "To hell with it. I changed my clothes once to-day; I ain't going to get wet any more." West then stayed
65 at the railing in the rain, the carpenter having gone under cover. West was waiting to see if the carpenter would return to help him, and the carpenter said to West, "Come on, Bob; to hell with it;" and thereupon West left the rail.

Q. (Paper shown witness marked "Plaintiff's Exhibit 2" for identification.) State, if you know, what that illustration represents.

A. The gangway as it was—the rails in the gangway as they were left by the carpenter and West—just before Mrs. Merchant fell overboard.

Q. State if you can from that paper indicate the position of the rails as left by the carpenter and West.

A. The hooks, as represented on the illustration, are too slanting;

they should be straighter; more as indicated on Plaintiff's Exhibit 3 for identification, the bent end representing the hook.

Q. State where the bent end of these rails were, as left by the carpenter and West.

A. They were left resting on the eye and not put into the eye, where they belonged.

Q. Did these hooks fit snugly into this eye?

A. Yes, sir; they went in with some difficulty.

Q. Then, I understand you, the carpenter and West were trying to fit them into the eye?

A. Yes, sir.

Q. The rails, as they appear in Plaintiff's Exhibit I for identification, are fitted into the eye, are they?

A. The hook is too slanting, but otherwise it shows as properly fitted in the eye.

Q. State what you saw in regard to Mrs. Merchant falling overboard on December 28, 1883?

A. I saw Mr. Tilbault, the steward of the vessel, running
66 to the door leading from the cabin to the deck opposite the gangway. I was in the room just forward of this door, and the gangway she fell through faced this door. I ran out to see what was the matter. The steward said: "My God, the stewardess is overboard." I then sprang from the gangway from which she fell into the water. The rails were hanging loose and were down at this time.

Q. (Paper shown witness marked "Plaintiff's Exhibit 4" for identification.) What does this represent?

A. To the best of my recollection, the position of the rails at the time I jumped into the water after Mrs. Merchant.

Q. How long a time had elapsed from the time the carpenter and West had left the railing and you jumping overboard?

A. In the neighborhood of twenty minutes, to the best of my recollection. I rescued Mrs. Merchant, and while in the water Thomas McLean came to my assistance; he is now away to sea.

Q. Did you notice anything on the side of the vessel in front of the opening or gangway?

A. A small boat—a kind of a yawl boat—tied to the gangway, and was lying under the opening, opposite the gangway, about one foot and a half from the side of the vessel.

Q. Do you know who has charge of the opening and closing of the gangway?

A. A carpenter, I think; I would not swear to it; either he or the second mate. They had a deck department, composed of captain, first mate, second mate, boatswain, and some sailors; that is all I know as to the sailors. At the time of the accident it was coming on the dusk of the evening; it was what I call twilight—it was daylight.

Q. What do you mean by daylight, in respect to the light?

A. It was like the light in the city of New York between four and five o'clock on a clear day, in the afternoon, at the present date (February). When I jumped in after her, after she had fallen, Mrs. Mer-

chant was about twenty-five feet from the vessel and was drifting with the current. I did not see her fall over.

Cross-examination by defendant's counsel:

This yawl-boat was propelled by oars. I was laughing at the carpenter and West because they were getting wet; it was a heavy shower.

67 The four documents referred to in Conway's deposition were then offered in evidence and marked, respectively 1, 2, 3, and 4.

A model for the purpose of showing the general arrangement of the rails, but with no claim that the same was accurate as to scale of dimensions, was offered in evidence and marked Exhibit 5.

These exhibits are now on the files of the court and are made a part of this record.

JAMES DAY, who testified:

I live in Brooklyn. I have been a physician and surgeon for twenty-seven years. I graduated in England and this country. I have known Mrs. Merchant for ten or twelve years. I have been physician of her mother's family. I remember being called to attend her in January, 1884, at her mother's house, in Long Island City. She was lying down, either on or in the bed, I don't remember. I think it was the middle of January. I was called upon to prescribe for her and to atttend to her as a physician.

68 Q. Please state what condition you found her in at that time—suffering from what, &c.

A. I found the patient I was called to attend, Mrs. Merchant, suffering from what is known in our profession as a severe case of synovitias.

Q. Please describe what that is.

A. Synovitias is an inflammation of the synovial membrane.

Q. What membrane is that; what part of the body is that?

A. The synovial membrane, sir—to save the time of the court I presume I had better state the fact—the synovial membranes are laid between the bones of all joints. The synovial membrane in this case is a membrane that lies underneath what we call the knee-cap or the patella. . It is a cushion to keep the bones apart.

Q. Some portion of the body near the knee?

A. It is underneath the knee-pan.

Q. You found her suffering from inflammation from that; you found that very much inflamed?

A. Very much inflamed.

Q. What results from such an inflammation of that membrane?

A. What is the result?

Q. Yes; usually what is the consequence?

A. Well, that depends a great deal upon the constitution of the patient and the treatment applied. It might result in a resolution—that means it might progress towards recovery—or it might result in the stiffness of the leg.

Q. Did it produce any such result in the case of Mrs. Merchant?

A. In this case the results have been very satisfactory, to a considerable extent; still, from the last examination I made a few days since, we have partial anchylosis, stiffness of the joint, immobility.

Q. Then the result of this inflammation to Mrs. Merchant has been to produce a stiffness in the leg?

69 A. If you wish me to do it—in the commencement we had synovitias inflammation of the synovial membrane; we had also with it inflammation of the whole of the knee-joint, including the tendons and cartilages of the joint. We were fortunate enough to subdue the synovial inflammation and prevent the formation of abscess. We have also, however, the consequence of that inflammation, which is cartilaginous enlargement, or enlargement of the cartilages of the knee-joint, producing partial anchylosis or stiffness or immobility, as you choose to call it—an improper action of the joint, with enlargement. Now, I have given you the condition that exists; if you want anything beyond that you will have to ask me.

Q. What, in your judgment, is ever likely to be the effect of this injury as to the future? Will she ever have the perfect use of her leg again?

A. Never; I say that guardedly; she will never have it as she has had it before. I will still, in the interests of justice, say that it is probable that in a year or two, perhaps two years, she may be able to use it fairly well, but it will never be what is was before, and never can be.

Q. What will always, in the most favorable aspect of the case, be the condition?

A. I have stated that; that is just what I have stated—the most favorable aspects.

Q. Will there always be a stiffness?

A. I am not quite sure of that, but there will be this condition resulting, that a slight jar, an unguarded step, or any unusual exercise of that limb will or may renew the inflammatory condition.

Q. Now as to pain; how as to that in the future?

A. Oh, the probabilities of that are good in her favor; I
70 don't think she will suffer much unless it be from the effects of weather; she will suffer from one thing — as she lives, and that is the change of weather.

I will simply state this, that the suffering in the condition that I treated—that she suffered under from the start from my treatments—is intense under any circumstances; under any circumstances synovitias is intense with pain.

Q. How long was she confined to her bed?

A. I think something like thirteen or fourteen weeks, perhaps.

Q. What effect has the change of weather upon her now?

A. I have already stated that she will feel it every time as long as she lives.

Q. Was she confined to her room or house after she got out of bed?

A. Certainly.

Q. How many more weeks was that?

A. I am hardly able to answer that question; I think the first time I have any knowledge of her being out of the house was in July I don't think she was out of the house because she came to my office and I believe that was in July.

Q. What did you prescribe for her?

A. I don't think that is hardly regular.

Q. Outward or inward?

A. Do you mean to say what treatment I used?

Q. Yes; internal or external?

A. Oh, external.

71 Q. Now, let me give you a hypothetical case. If a party falls overboard from a steamer or vessel and strikes against a boat in falling—a boat in the water—is that likely to cause such an injury?

A. It might be caused in that way.

Q. To produce an injury like that—would striking any hard substance produce an injury like that at the knee?

A. Certainly.

Q. Have you rendered any bill to Mrs. Merchant?

A. She has always been prompt to pay me all the way along until—I think there is a little bill left. I don't know what it is.

Q. Do you know how much she has paid you?

A. I do not.

Q. About?

A. When I have cash patients I don't keep much account of them. I can let you know.

Q. Just tell us, about.

A. I would answer that question, sir, if it was in my power, but Mrs. Merchant's family, her mother and sisters and brothers—I have been their family physician for many years, and it has been their rule to pay me almost every visit or, if not every visit, perhaps at the end of the month. I am a very poor book-keeper and I generally put down so much money received to-day, and I don't know how much it came to.

72 At the start I went every day. After the daily visits were dispensed with I went, perhaps, once in ten days for awhile—for two or three months—and then once in two or three weeks.

The deposition of Robert John West, who had been examined before trial on the part of the defendant, was then read in evidence by the plaintiff's counsel.

ROBERT WEST, being duly sworn and examined, says:

My name is Robert John West. I am 30 years of age. I am porter in the steward's department of the steamship "Bermuda." She is now in the port of New York, bound to Windward Islands. I have been employed on steamers for the last 14 years. My home is Quebec, Canada. I was on board the "Bermuda," in Trinidad, last December, when Barbara Merchant fell overboard. I was then porter on the "Bermuda." My duties, as porter, was to look after the luggage, lamps, and brass-work. I had to trim lamps and keep

brass-work clean. At the time Mrs. Barbara Merchant fell the steamer was at anchor a mile and a half to two miles off shore. She fell from the aft part of the steamer. Around the deck of the "Bermuda" aft is an iron railing, about three feet high, to the best of my knowledge. There are openings in it. I know the opening through
which Mrs. Merchant fell. It is about two feet and a half to
73 three feet wide. I never measured it. It is made fast on one
side. There is a railing across it, which lifts up, made of iron. The rail is fast on one end to remain so. It is fastened by two hooks; one goes into the other and then clinch together. The rail swings
up and down on these hooks. At the other end of the rail
74 is a hook; this goes into an eye when the rail is up; that eye
is on the stationary rail. On the day Mrs. Merchant fell the rail was in place when we were coming in; it was opened after we were at anchor; it was opened to put out the luggage. I saw it open last before the accident—about ten or fifteen minutes before the accident. I was then coming from the forward part of the ship, going aft to see after a passenger's luggage. I spoke to the ship's carpenter about the rail at that time. The carpenter was by the after hatch. It was rainy weather when I spoke to him—it was pouring down. I said to him it was better to put in that rail before anything would happen. I don't know whether he put it in; I went into the saloon. I can't say how long I stayed in the saloon. I left the saloon to put Mr. Harrison's luggage between decks; that was one piece; the other pieces had been put on board. I was in the saloon when I heard of Mrs. Merchant's accident. I was not doing anything. I had come up from between decks. My attention was attracted to the accident for I heard the fall. I ran to the rail. Mrs. Merchant was then in the water. They got her into a small boat. John Conway and Thomas McLane, two of the waiters, did this. One jumped off the rail. I don't remember the carpenter's name. I cannot say whether he is on the steamer or not. I have not seen him since last February.

Cross-examination as originally taken by the plaintiff's counsel:

The Harrisons of whom I spoke were passengers from New York to the islands, and were going to land at Trinidad, which is one of the islands where this vessel stops. They had trunks with them; the opening of which I spoke, and which was closed when we arrived opposite Trinidad, was opened in order to put off this luggage. To make this opening, three or four rods had to be removed. They
are each fastened to one side of the permanent rail by means
75 of the clinched eyelets I have spoken of, and at the other side
each enter into permanent eyelets; the end of each of these rods which pass into the eyelet are bent in the shape of a hook or poker; they fit in snug to the eyelet. I don't know whether they have difficulty in getting them in when they close the opening. I never fitted in any myself. I have raised the rods, but not these; those on other parts of the vessel. Those I raised are on the starboard side, forward of where Mrs. Merchant fell. The opening through which

Mrs. Merchant fell was on the starboard side aft. I did not assist in raising the rods on the port side of the vessel. The rods on the starboard side forward, which I did raise, are similar to those at place where Mrs. Merchant fell, and are attached and fit in in the same way.

Q. State how you raised or assisted to raise the rods on the starboard side forward?

A. Generally when I raised them I took them right out. There is a pin that goes through the end of the hook below the eye. I knock out that pin and raise up the hook. The rods on the starboard side forward fit snugly.

Q. How snugly?

A. To my judgment, as snugly as they ever could be made.

Q. So much so that it was at any time difficult to raise these rods?

A. No, sir; we could always get them up by lifting with my hands, but there was a strain.

Q. How much of a strain?

A. I had to use my two hands sometimes.

76 Q. Because you would find a resistance with one hand?

A. It was rather a tight fit. A colored boatman raised the rods at the place where Mrs. Merchant fell on that day. I don't know who was present when the rail was raised. I was not present when the rail was raised; I was not present. I saw him open the last rail, but not the others. I don't know of my own knowledge who opened the others. At the time last was raised I was standing about amidships; I can't say how far from the opening exactly; about twenty feet. I was coming from forward at the time; no one but the colored boatman was at the opening; there were others at the after hatchway, inside.

Q. There were none of the officers nor crew at the opening when the colored boatman took the last rail or rod off?

A. None that I saw. After the rods were removed luggage was taken through the opening; the baggage belonged to the Harrison family. I did not help take it through. The conversation I had with the carpenter was after the baggage went through. When the baggage was being taken off it was raining a little—not much. No baggage besides the Harrisons was taken ashore at that time through this opening.

Q. Will you please tell us for what purpose this opening at which Mrs. Merchant fell was made on that day?

A. Well, I don't know of any other purpose than that one that the Harrison's luggage was put through. I saw a carpenter within

77 five or ten minutes after the Harrison's baggage had been put over. At that time it was raining quite hard. At that time there was a good many on deck, but I forgot who it was. I don't remember whether they were officers, crew, or passengers. When I first saw the carpenter he was by the after hatch. I said to him, "Go and fix up that rail before anything would happen." The rods were then all hanging down so that there was then a complete opening. The carpenter said, "Wait until the rain goes over." That

is his very words. John Conway was the first one who jumped to save Mrs. Merchant.

I can't remember whether it was raining or not when I went out and saw Mrs. Merchant in the water. The permanent rail around the deck is composed of three or four iron rods supported by iron stanchions, one rod above the other, about nine inches apart, and at the various openings the number of rods closing the openings correspond to the number of rods in the permanent rail.

Q. When you stated to the carpenter, in this conversation, that he had better put the railings up didn't he reply, "Oh, damn it; wait until it stops raining?"

A. He didn't say it in that way.

Q. Did you ever state to any one that that was his language?

A. Not that I am aware of. I have seen Mr. David Gerber before now present. I had a conversation with him about this accident; that was either January or February of this year; I am not positive which.

Q. Was it not in the first part of May?

A. I am not positive as to the month. I only saw Mr. Gerber once. In my conversation with the carpenter I told him somebody might fall overboard. He said, "Wait until the rain goes over."

Q. Didn't he say, "Oh, that will be all right," or words to that effect?

A. Not that I am aware of.

Redirect examination, as originally taken by the defendant's counsel:

After talking with the carpenter I ran in out of the rain. I don't know whether he put up the rails or not. I did not see him or take any notice of the opening until after the accident. I do not know the condition of the rods in the opening at the time Mrs. Merchant fell.

78 BARBARA MERCHANT, recalled, testified:

The bill of the doctor's charges is about $150, and for medicines $20 or $25. I was born in Greenbush, New York State.

The plaintiff then rested.

Defendant's counsel then stated: If your honor please, no fault is found with the structure (referring to the opening represented by model).

PLAINTIFF'S COUNSEL: That is, we don't say it was badly constructed.

The defendant, to maintain the issues on its part, produces the following witnesses and evidence:

EDWARD WHITEHURST, who testified:

I am a master mariner, and have been such since 1861, in first-class steamships out of the port of New York—in first-class pas-

senger steamers, ocean steamers, running in the West India trade and to New Orleans, coasting, and to the West Indies. I know the steamer "Bermuda." I was master of her for two and a half years. I was the master of her at the time Mrs. Merchant, the plaintiff, fell overboard. I am familiar with the construction of the port gangway through which she fell. The model which has been put in evidence represents the design of it exactly.

79 Q. How many such openings were there in the Bermuda?

A. Both sides alike; starboard and port, both alike.

Q. How many of these gangways were there in the Bermuda?

A. Three of that size.

Q. And others larger?

A. There were others larger; yes; two larger and three of that size.

Q. The larger ones are for the handling of cargo?

A. Yes, sir; the larger ones are for cargo and the others for passengers.

Q. How long have they been in the steamer?

A. They were put in when the steamer was built; put in before I came there, and they are there now.

Q. Has there been any change in the gangway?

A. Not at all, nor in the rails; there has been no change.

Q. Nor in the gangways?

A. Not in the rail of the gangway; no change at all; the same as it always was; the only change is the house; that has nothing to do with the rail.

Q. How long was Mrs. Merchant on the steamer as stewardess?

A. I can't exactly say; I should think about a year and a half; I don't remember exactly.

Q. Were you master all the time?

A. Yes, sir; all the time.

Q. Will you state to what extent these small gangways were used?

A. They were used in port; this one that you speak of was used in port.

Q. In New York?

A. In New York; yes.

Q. At other ports?

A. Yes, sir; at other ports.

Q. Are you familiar with the construction of gangways on ocean steamers?

A. Yes, sir.

Q. Will you state whether this construction was or was not a proper one?

PLAINTIFF'S COUNSEL: We raise no point about that at all.

80 Q. How large a crew did you carry on that trip on the Bermuda, about?

A. 32 or 33; I don't remember exactly; either 32 or 33.

Q. They comprised what class of servants?

A. They are divided into three classes.

Q. They comprise what class of servants?
A. Deck department, engineer's department, and steward's department.
Q. Who signed the shipping articles?
A. They all signed it; everybody on board; all the thirty-three people; they all signed it.
Q. Please tell what these thirty-two different people are.

PLAINTIFF'S COUNSEL: We object to that; he stated that they comprised three departments, deck department, engineer's department, and steward's department,

Q. Who are they in the deck department?
A. Sailors and officers in the deck—first and second officer, carpenter, captain, purser; that is the deck.
Q. Who were in the engineer's department?
A. Engineers, firemen, and coal-passers.
Q. And in the other department?
A. Steward, waiters, cooks, and stewardess.
Q. Which department is the porter in?
A. In the steward's department.

Cross-examined by plaintiff's counsel:

Q. I think you are in error; see if you are. Wasn't Mrs. Merchant on board the vessel under another captain?
A. I couldn't say; she was there all the time I was there.
Q. Did you see her fall through?
A. No, sir.
Q. Do you know the fact that luggage was taken off at Trinidad, Spain, just before she fell through?
A. I presume so, because we had passengers for that port.
Q. Do you know whether she fell through where the luggage was taken through?
A. Yes.
Q. Did you see these rails open for the purpose of letting the luggage go through?
A. No, sir; I was not there.
Q. Where were you?
A. I was on shore.
Q. You belong to the deck department?
A. I presume I do.
Q. The deck department consisted of master, mate, and sailors?
A. Yes, sir.
Q. What else?
A. Carpenter.
Q. And you are in command of the deck department?
A. I am in command of the whole vessel.

The defendant here rested.

81 Defendant's counsel then requested the court to direct the jury to find a verdict for the defendant on the grounds: First,

that the injury sustained by the plaintiff was an injury occasioned, if there was any negligence, by the negligence of a fellow-servant; and, secondly, that on the uncontradicted testimony the plaintiff herself was guilty of contributory negligence and could not recover.

The court refused to so direct the jury; to which refusal the defendant's counsel then and there duly excepted.

The court then charged the jury, among other things, as follows:

(Only two parts of the charge which relates to the question involved on this appeal are inserted.)

82 * * * * * * *

There is still another rule of law which has been discussed in your presence, and that is that one servant cannot recover of the common master by reason of the negligence of a fellow-servant. Who fellow-servants are in all cases has never been determined by the courts. The courts have determined the precise cases presented to them, but they have never laid down a rule applicable to all. I had supposed that parties occupying the relations that these parties did—that is, the one a stewardess, the other a carpenter, and the third a porter—stood in relation of fellow-servants; but, in view of some of the cases which have been referred to by the learned counsel for the plaintiff, I have thought it safer and more just to all concerned to submit the question to you to determine whether or not this accident was occasioned by the negligence of a servant in a totally different department, because some of the cases referred to de-

83 cide substantially this proposition, viz., if the servants are employed one in one department and another in a totally distinct and separate department, and the negligence of one occasions injury to the other, the common master is liable.

The burden of proof is upon the plaintiff to satisfy your minds by a fair preponderance of evidence that this accident did occur in that way—that is, by the negligence of a servant in a totally different department from herself. Then the burden shifts, and it is for the defendant to satisfy you by the same weight of evidence that the plaintiff contributed to the accident. If the plaintiff satisfies you by a fair preponderance of proof that the accident occurred by reason of the negligence of a servant in another and totally different class of employment, then the action is so far established, and it is for the defendant to prove the defense of contributory negligence; and if the defendant does satisfy you that the plaintiff's carelessness contributed to the accident in any degree she cannot recover.

Coming now to the facts in the case, it appears that on the 28th day of December, 1883, the plaintiff was stewardess of the ship Bermuda, owned by the defendant; that upon that day the ship anchored at the port of Trinidad, a mile and a half or two miles from land, and that some passengers and baggage were taken off through the gangway in question; that in the afternoon, between four and five o'clock, the bars were put up, or an attempt was made to put them up, by the porter, West, and the carpenter, whose name does not appear.

And I say to you, as a matter of law, that if you find that this accident was occasioned by reason of the negligence of the porter, West, who concededly was a fellow-servant with this plaintiff in precisely the same department, the steward's department—if you find that the accident was occasioned by his negligence, then there can be no recovery against the defendant.

84 Instead of putting the hooks through the eyes they were allowed to remain negligently resting upon the eye, so that a pressure upon them would force them out. While they were in this condition, it being dusk or nearly dusk, the plaintiff came out of the cabin to empty some refuse into the sea. Doubtless, in throwing the water over, she leaned against these bars; they fell out, and she was precipitated from the ship, receiving the injury of which she complains.

When the case for the plaintiff closed there was no evidence to show to what department or departments these three persons, the plaintiff, the carpenter, and the porter, belonged; but the captain of the ship has testified that the crew were divided into three separate and distinct departments—the steward's department, the deck department, and the engineer's department; that the carpenter belonged to the deck department, which was composed of the captain, mate, sailors, and carpenter, and that the plaintiff belonged to the steward's department.

The only evidence showing how the accident occurred or how the bars were placed in the condition which caused it is found in the deposition of Mr. Conway, taken on behalf of the plaintiff, and the evidence of the porter West. I will read you what Conway says:

"I was standing in the room to the right of the railing or opening, forward of the gangway, and Mrs. Merchant was in the room aft of this gangway. I stood looking out of the window, laughing at the carpenter and porter West trying to fix the rails or bars at this gangway. The Harrison baggage had been taken out by this time. They were trying to fix those rails in the proper position. The rails had been down to let the baggage off, and they were trying to put them up again. West was at one stanchion pushing

85 forward, while the carpenter stood at the other, where the hook fitted into the eye, trying to force it into the eye."

According to this evidence they were both there endeavoring to fix up the bars.

"It began raining and the carpenter and West were beginning to get wet. I heard the carpenter and West speaking; the carpenter said, 'To hell with it; I changed my clothes once to-day; I ain't going to get wet any more.' West then stayed at the railing in the rain, the carpenter having gone under cover. West was waiting to see if the carpenter would return to help him, and the carpenter said to West, 'Come on, Bob; to hell with it;' and thereupon West left the rail."

The only other evidence is that of the porter, West, who, as I recollect it, testified that he was not there at all; that he told the carpenter to go and put up the rail, but did not assist himself in so doing.

This is, I think, all the evidence bearing upon this branch of the

case, and it is submitted to you; under the rules of law to which I have called your attention, to say whether the defendant was guilty of negligence or not. * * *

86 Therefore, bearing in mind that the question for you to determine is whether this negligence, if you find it negligence, was occasioned by the careless act of a servant not in the same employment with the plaintiff—not in the same department.

As I said before, if you find it was the negligence of the porter then there can be no recovery, because he was a fellow-servant in the same grade of employment. * * *

A juror then asked: "Will your honor explain in regard to the fact that two were there, the carpenter and porter. Would your honor give us any instructions on the question of legal responsibility then, if either party, the porter and carpenter being conceded for a moment to have been present on that day, and leaving that position?"

To which the court replied: "I will say this, that you must find that the negligence of the co-employee solely produced the accident in order to exempt the defendant."

87 Defendant's counsel then requested the court to charge the jury that the porter was as much liable to negligence and chargeable with negligence as the carpenter, and that if the accident resulted from the negligence of the porter, although the negligence of the carpenter contributed to it, that the defendant is exempt.

The court refused to so charge; to which refusal the defendant's counsel then and there duly excepted.

Defendant's counsel then duly excepted to that portion of the charge of the court which left it to the jury to determine whether the accident was occasioned through the negligence of a servant in a different department.

The jury found a verdict for the plaintiff in the sum of $5,000.

The defendant's counsel thereupon, at said term of court, moved that the verdict be set aside as against the weight of evidence and for a new trial, on the minutes of the court, and for a stay of entry of judgment.

Thereupon the court granted such stay and announced that it entertained the rest of the motion and would hear argument thereon; and thereafter the court, having heard argument thereon, did, on the third day of February, 1886, deny said motion;

88 to which denial defendant's counsel then and there duly excepted.

And because none of said exceptions so offered and made to the rulings and opinion and decision of the said presiding judge do appear upon the record of the said trial, and a case having been made by the defendant, now, therefore, on the prayer of said defendant, this bill of exceptions is made and hereby stated, settled, and allowed as of the term when said cause was tried, to wit, the October term, 1884.

Witness my hand and seal. Dated this third day of February, 1886, as of the term aforesaid.

ALFRED C. COXE. [L. S.]

89 [Endorsed:] U. S. circuit court, southern district of New York. Barbara Merchant against The Quebec Steamship Company. Bill of exceptions. To A. J. Dittenhoefer, Esq., pl'ff's att'ys. U. S. circuit court. Filed Feb'y 3, 1886. Timothy Griffith, clerk. Butler, Stillman & Hubbard, att'ys for defendant, 111 Broadway, New York.

Due service of a copy of the within bill of exceptions is hereby admitted.

N. Y., Jan'y 21, 1886.

A. J. DITTENHOEFER,
Pl'ff's Att'y.

90 United States Circuit Court, Southern District of New York.

BARBARA MERCHANT *vs.* QUEBEC STEAMSHIP COMPANY.

Coxe, *J.:*

The motion, at the close of the evidence, to direct a verdict for the defendant was necessarily decided without an opportunity for that full and careful examination which its importance demanded. The decision of the Supreme Court in Ross *v.* The Chicago, Milwaukee and St. Paul Railway Co. (112 U. S., 377) had been but recently announced, and in view of the reasoning of the court in that case and in the cases cited with approval in the prevailing opinion, and in view, also, of the evident disposition in many of the Federal circuits to relax the rule invoked by the defendant, it was thought that the wisest course to adopt, under all the circumstances, was to submit the cause to the jury. The court, at the trial, entertained very grave doubt as to the plaintiff's right to recover, & now, after re-reading the opinion in the Ross case, and after a more thorough review of the authorities, that doubt is still present.

91 It is well nigh impossible, in view of the existing conflict of opinion, to formulate any comprehensive rule upon the questions involved. It may, however, be said that the general tendency of modern decision is to abate the austerities of the rule which exempts the master from liability for injuries occasioned by the negligence of fellow-servants and to confine it wi thin ever-narrowing limits.

In some of the States it has been practically abrogated by judicial decision, in others by express statute. The railroad commissioners of our State, in an able review of the subject, recommend action by the Legislature looking to its abandonment. (Report for 1883, vol. 1, page 54.)

In the recent case of Garrahy *v.* Kansas City, St. J. & C., B. R. Co. (25 Fed. Rep., 258) the rule is still further relaxed, if, indeed, the logic of that decision is not to overthrow it altogether.

Without intending to enter upon a discussion of the subject, it suffices to say that the question in the case at bar is involved in doubt. How it will ultimately be disposed of cannot be foretold of with certainty. The case will, in any event, be taken to the Su-

preme Court. It is a case which should go there. The record now before the court is in proper form to present to the appellate tribunal the question for review.

92 If the motion is granted there must be a new trial, resulting in a verdict for the defendant. Should the Supreme Court thereafter decide that there was error in the direction of a verdict for the defendant, still another trial must be had. It would seem for the advantage of both parties that delay so unnecessary should be avoided and expense so needless should not be incurred. Upon the present record the action of the Supreme Court will be final.

The motion should, therefore, be denied, but upon the condition, of course, that the plaintiff enter judgment for the full amount of her recovery, and interest.

93 [Endorsed:] No. —. United States circuit court, southerdistrict of New York. Barbara Merchant *vs.* Quebec Steamship Company. Memo. of decision. Original. A. C. C. U. S. circuit court. Filed Dec. 28, 1885. Timothy Griffith, clerk.

94 Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight hundred and eighty-six.

THE QUEBEC STEAMSHIP COMPANY, Plaintiff in Error,

versus

BARBARA MERCHANT, Defendant in Error.

In error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Quebec Steamship Company, by Butler, Stillman and Hubbard, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that the declaration aforesaid and the matters therein contained are not sufficient in law for the said Barbara Merchant to have or maintain her aforesaid action thereof against the said The Quebec Steamship Company; there is also error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Barbara

95 Merchant against the said The Quebec Steamship Company, whereas by the law of the land the said judgment ought to have been given for the said The Quebec Steamship Company against the said Barbara Merchant; and the said The Quebec Steamship Company prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it *be* may be restored to all things that it hath lost by occasion of the said judgement, etc.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Plaintiff in Error.

96 [Endorsed:] U. S. Supreme Court. The Quebec Steamship Company ag'st Barbara Merchant. Assignment of error. Butler, Stillman & Hubbard, 111 Broadway, New York. U. S. circuit court. Filed Mar. 15, 1886. Timothy Griffith, clerk.

97 Circuit Court of the United States, Southern District of New York.

BARBARA MERCHANT, Plaintiff,
against
THE QUEBEC STEAMSHIP COMPANY, Defendant.

Know all men by these presents that we, The Quebec Steamship Company, Charles H. Coster, and George S. Bowdoin, are held and firmly bound unto the above-named Barbara Merchant in the sum of seven thousand five hundred dollars, to be paid to the said Barbara Merchant, her executors, or administrators; for the payment of which, well and truly to be made, we bind ourselves, our and each of our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

98 Sealed with our seals and dated the 25th day of February, in the year of our Lord one thousand eight hundred and eighty-six

Whereas the above-named The Quebec Steamship Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of New York, in the second circuit:

Now, therefore, the condition of this obligation is such that if the said Quebec Steamship Company shall prosecute its writ of error to effect and answer all damages and costs if it shall fail to make its said writ of error good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

99 [L. S. Quebec Steamship Company. G. P. G. G. P. G.]

QUEBEC STEAMSHIP CO.,
By A. EMILIUS OUTERBRIDGE, *Ag't.*
G. S. BOWDOIN. [L. S.]
C. H. COSTER. [L. S.]

Subscribed, sealed, and taken before me—
GEO. P. GORDEL.

SOUTHERN DISTRICT OF NEW YORK,
State, City, and County of New York, } ss:

I certify that on this 25th day of February, 1886, before me personally appeared A. Emilius Outerbridge, to me personally known, who, being by me first duly sworn, did depose and say that he is one of the firm of A. E. Outerbridge and Company, agents in this city of the Quebec Steamship Company named in the foregoing bond; that

he knows the common seal of said company, and that the
100 seal affixed to the foregoing bond is such common seal and was so affixed, and he executed said bond on behalf of said company by due authority thereof; and I do further certify that on said 25th day of February, 1886, before me personally appeared Charles H. Coster and George S. Bowdoin, both by me personally known, and known to me to be two of the persons named in the foregoing bond and who executed the same, and who severally acknowledged that they executed the same.

[L. S.] GEO. P. GORDEL,
Notary Public, N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, } ss:
State, City, and County of New York, }

Charles H. Coster and George S. Bowdoin, being severally
101 duly sworn, do depose and say, and each for himself says, that he, said Charles H. Coster, resides at 23 East 24th street, city of New York, and that he, said George S. Bowdoin, resides at 39 Park avenue, in the city of New York; and each says that he is a householder in the State of New York, and is worth double the amount of the penalty of the foregoing bond over and above all his just debts and liabilities and exclusive of property exempt by law from execution.

C. H. COSTER.
G. S. BOWDOIN.

Sworn to before me this 25th d'y of Febr'y, 1886.

[L. S.] GEO. P. GORDEL,
Notary Public, N. Y. Co.

The foregoing bond is hereby approved as to form, amount, and sufficiency of sureties.

N. Y., Feb'y 25, 1886.

A. J. DITTENHOEFER,
Pl'ff's Att'y.

102 Endorsed: Circuit court of the United States, southern district of New York. Barbara Merchant, plaintiff, *v.* Quebec Steamship Company, defendant. Bond. Butler, Stillman & Hubbard, def't's att'ys, 111 Broadway, New York. Approved as to form, amount, and sufficiency of surety. W. J. Wallace. U. S. circuit court. Filed Feb'y 25th, 1886. Timothy Griffith, clerk.

103 *Affidavit of Service.*

U. S. Supreme Court.

THE QUEBEC STEAMSHIP COMPANY, Pl'ffs in Error,

against

BARBARA MERCHANT, Def'*ts* in Error.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

William H. Wilson, Jr., being duly sworn, says he is a clerk in the office of Butler, Stillman & Hubbard, attorneys for the pl'ffs in error herein; that on the 8th day of March, 1886, at number — 6th street, Hunter's Point, L. I., he served the annexed citation on Barbara Merchant. Deponent made such service by delivering a copy of the same to and leaving the same with her personally, at the same time exhibiting to her the signature.

WILLIAM H. WILSON, JR.

Sworn to before me this 10th day of March, 1886.

[Seal Daniel A. O'Connell, Notary Public, N. Y. Co.]

DANIEL A. O'CONNELL,
Notary Public, N. Y. Co.

104 The United States of America to Barbara Merchant, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in clerk's office of the circuit court of the United States for the southern district of New York, wherein the Quebec Steamship Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Wm. J. Wallace, judge of the circuit court of the United States for the southern district of New York, this 25th day of February, 1886.

WM. J. WALLACE.

Attest: TIMOTHY GRIFFITH, *Clerk.*

105 [Endorsed:] U. S. Supreme Court. The Quebec Steamship Company, pl'ff in error, ag'st Barbara Merchant, def't in error. Citation. Butler, Stillman & Hubbard, att'ys for pl'ff in error, 111 Broadway, New York.

We hereby admit due personal service this day upon the defendant in error., Barbara Merchant, and due service upon me, as her attorney, of a copy of the within citation.

N. Y., Feb. 26, 1886.

A. J. DITTENHOEFER,
Att'y for Pl'ff, Barbara Merchant.

E. & A. A.—579.

Endorsed on cover: S. New York C. C. U. S. No. 264. The Quebec Steamship Company, plaintiff in error, *vs.* Barbara Merchant. Filed May 1, 1886.

Supreme Court, U. S.
FILED
MAR 30 1889
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 264.

THE QUEBEC STEAMSHIP COMPANY,

Plaintiff in Error,

vs.

BARBARA MERCHANT.

BRIEF FOR PLAINTIFF IN ERROR.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Plaintiff in Error.

WILLIAM ALLEN BUTLER,
WILHELMUS MYNDERSE,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE QUEBEC STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

BARBARA MERCHANT.

No. 264.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This cause comes before the Court on a writ of error to the Circuit Court of the United States for the Southern District of New York, bringing up for review a judgment entered February 20, 1886, upon a verdict in favor of the plaintiff below against the defendant, for the sum of $5,306, and costs.

Judgment, Record, fol. 40.
Writ of Error, fol. 2.

The action was originally commenced in the Superior Court of the City of New York by the plaintiff below, Barbara Merchant, against the defendant, the Quebec Steamship Company, a foreign corporation, to recover damages in the sum of $25,000 for alleged personal injuries sustained by the plaintiff while in the employ of the steamship company as stewardess of the steamer *Bermuda*.

The COMPLAINT averred the incorporation of defendant, and that on December 28, 1883, the plaintiff, while lawfully on board the said vessel, the *Bermuda*, and while in the discharge of the duties of her employment as stewardess, fell from the deck of said vessel into the water, severely injuring herself, solely because of defendant's negligence in wrongfully, improperly and negligently fastening the railing or guard around said vessel, and that by reason thereof she sustained damages in the sum of $25,000, for which judgment was demanded, with interest and costs.

Complaint, fols. 25–27.

The ANSWER admitted the incorporation of defendant, and the employment of the plaintiff as stewardess, as alleged in the complaint, and put at issue the other material allegations of the complaint and, as a further, separate and distinct defense, alleged that the fall of plaintiff from the vessel, and her injuries sustained thereby, were due solely to her own negligence or that of her fellow servants on the vessel.

Answer, fols. 29-31.

The cause was, before trial, removed into the Circuit Court of the United States for the Southern District of New York on the application of the plaintiff.

Petition, fols. 10–15.

The issue joined by the complaint and answer was tried before the Honorable ALFRED C. COXE and a jury February 11, 1885.

THE LEADING FACTS APPEARING AT THE TRIAL WERE AS FOLLOWS:

Barbara Merchant, the plaintiff, by occupation a stewardess, was employed in that capacity on the steamer *Bermuda*, of the Quebec Steamship Company's West India Line. She had been on the steamer about eighteen months (*fol. 46*). It was her duty as stew-

ardess to attend to the ladies' rooms in the cabin (*fol. 47*), and in the course of that duty to empty slops, as to which her orders were to throw them over the ship's side. The cabin was on deck. A railing extended around the entire vessel, and consisted of four iron bars supported by stanchions about four feet and a half apart (*fol. 63*). In this railing there were openings or gangways for the handling of freight and also for receiving and discharging passengers. Three of the gangways were for passengers (*fol. 78*). One of them faced one of the doors of the cabin, opening on the deck. In using these openings or gangways, the four iron bars of the gangway section of the railing, instead of being fixed immovably to the stanchions, were fastened at one end to the stanchion by rings or eyelets, in which the bars could swing, the other end of each bar being hooked so as to go into an eye fastened on the stanchion to receive the hook (*fol. 63*). *See diagram opposite page 12 of Record, also fols. 73, 75.*

The railing and the gangways in the railing were properly constructed (*fols. 78, 79*).

On the day of the accident, December 28th, 1883, the steamer *Bermuda* was at anchor a mile and a half to two miles off shore from the island of Trinidad, one of the islands at which the steamer stopped in her trips (*fols. 72, 74*). Certain passengers from New York on the steamer were to land at Trinidad, and their baggage was put off the steamer through the gangway on the starboard side, aft, into a shore-boat (*fol. 75, p. 31*). To do this, the rails of the gangway were raised and the gangway opened (*fols. 64, 74, 77*). After the baggage had been taken through the gangway, the ship's carpenter, and the ship's porter, West, undertook, according to the testimony of Conway, plaintiff's witness, to replace the rails in their proper position. "The porter was at one stanchion pushing the rails forward, while the carpenter stood at the other stanchion, where the hook fitted into the eye, trying to force it into the eye. It began raining, and the carpenter and the porter, West, were beginning to get wet." Thereupon, the carpenter left the gangway,

and the porter, after staying awhile at the gangway, also left; the rails were not placed in their proper position, but remained so far unfastened that the hooks were not placed in the eyes (*fols. 64, 65*).

The carpenter was not examined. The porter, West, was examined as a witness for the defense, and testified that he told the carpenter to put the rails in (*fols. 74, 77*), and he said, "Wait till the rain goes over" (*fols. 76, 77*).

This was about five o'clock in the afternoon (*fol. 51*).

At this juncture, the rails being thus unfastened, the stewardess, who was "stripping the linen in the ladies' rooms; also emptying slops," took out a pail of slops, which was filled with torn envelopes and orange peeling, and which, according to her orders were to be thrown over the ship's side, as usual (*fol. 47*).

She stepped out of the cabin through the door facing the railing, walked to the ship's side, and, as she testified, "went out with the slops and fell overboard. I both felt and seen the rails go with me."

Q. Did you fall through the opening where these rails were?

A. I did; yes, sir (*fol. 48*).

John Conway, one of the crew, jumped into the water and rescued her (*fol. 66*). She sustained injuries requiring medical treatment and was confined to her bed for a considerable time (*fol. 70*).

No question was made by plaintiff as to the construction of the gangway (*fol. 79*). The sole claim was that there was negligence in not properly replacing the rails in the gangway. The plaintiff had been in the habit, continuously, of emptying slops at this gangway and knew the hooks were there but "had never noticed it" (*fols. 56, 57, 58*).

It further appeared by the defendant's evidence that the ship's company of the *Bermuda* consisted of 32 or 33 persons, comprising deck, engineer's and steward's departments. The evidence of the master on this point was as follows (*fol. 80*):

"Q. Who are they in the deck department?
"A. Sailors and officers in the deck—first and second
" officer, carpenter, captain, purser; that is the deck.
"Q. Who were in the engineer's department?
"A. Engineers, firemen and coal passers.
"Q. And in the other department?
"A. Steward, waiter, cooks and stewardess.
"Q. Which department is the porter in?
"A. In the steward's department."

The master of the *Bermuda* testified that everyone on board signed the shipping articles.

The plaintiff, by her own admission, signed the shipping articles and participated in salvage awarded to the steamer (*fol. 58*). She was thus one of the ship's company.

The master was in command of the whole vessel (*fol. 80, at end*).

At the close of the evidence the defendant's counsel insisted, as matter of law, that the accident was caused by the negligence, if there was any negligence, of a fellow servant of the plaintiff, and that as the uncontradicted evidence the plaintiff herself was guilty of negligence, and asked for a direction of a verdict in favor of defendant which was refused by the Court and defendant's counsel excepted (*fol. 81*).

The Court left the question of contributory negligence of the plaintiff to the jury and on the question of the negligence of fellow servant charged as follows:

"There is still another rule of law which has been
" discussed in your presence, and that is that one servant
" cannot recover of the common master by reason of the
" negligence of a fellow servant. Who fellow servants
" are, in all cases, has never been determined by the
" Courts. The Courts have determined the precise cases
" presented to them, but they have never laid down a
" rule applicable to all. I had supposed that parties
" occupying the relations that these parties did—that is,
" the one a stewardess, the other a carpenter, and the
" third a porter—stood in the relation of fellow servants;
" but, in view of some of the cases which have been
" referred to by the learned counsel for the plaintiff, I
" have thought it safer and more just to all concerned
" to submit the question to you to determine whether

"or not this accident was occasioned by the negligence "of a servant in a totally different department, because "some of the cases referred to decide substantially this "proposition, viz., if the servants are employed one in "one department and another in a totally distinct and "separate department, and the negligence of one occas- "ions injury to the other, the common master is liable.

"The burden of proof is upon the plaintiff to satisfy "your minds by a fair preponderance of evidence that "this accident did occur in that way—that is, by the "negligence of a servant in a totally different depart- "ment from herself. Then the burden shifts, and it is "for the defendant to satisfy you by the same weight "of evidence that the plaintiff contributed to the acci- "cident. If the plaintiff satisfies you by a fair prepon- "derance of proof that the accident occurred by reason "of the negligence of a servant in another and totally "different class of employment, then the action is so "far established."

To this portion of the charge the defendant's counsel excepted.

See fol. 87. "Defendants' counsel then duly ex- "cepted to that portion of the charge of the court "which left it the jury to determine whether the acci- "dent was occasioned through the negligence of a ser- "vant in a different department."

The defendants' counsel requested the court to charge that if the accident resulted from the negligence of the porter, the negligence of the carpenter contributing to it then the defendant was exempt. The court refused so to charge and the defendants' counsel excepted (*fol.* 87).

The jury found a verdict for the plaintiff for $5,000 (*fol.* 87).

A motion was made for a new trial, and in his decision, referring to the question arising on the undisputed evidence whether the negligence which resulted in the injury to the plaintiff was that of fellow servants with plaintiff, the learned Circuit Judge expressed his doubt on the subject and made a disposition of the case

with a view to its being taken to this Court by writ of error.

He denied the motion for a new trial, but required judgment to be entered for the whole amount of the verdict and interest (*fols.* 90–93).

Judgment was accordingly entered for $5,306, and costs, and writ of error was duly taken.

Assignment of Errors.

1. The Circuit Judge erred at the trial in determining that the plaintiff was entitled to recover in this action if the accident was occasioned through the negligence of a servant in a different department and in so charging the jury.

2. The undisputed proof having established the fact that the plaintiff was one of the ship's company and that the negligence causing the injury to her was that of another, or of two others of the ship's company, to wit, the carpenter or the porter, one or both, it was error to leave to the jury any question as to departments of service. In law the injury was caused by a fellow servant of the plaintiff.

3. The Circuit Judge erred in not directing a verdict for defendant as requested at fol. 81.

4. On the question involved as stated by the learned Circuit Judge at fol. 82, and *fols.* 90, 91, he erred in not ruling at the trial that the defense of negligence of a fellow servant was established, and in leaving any question to the jury.

POINTS.

First Point.—It was established by the undisputed evidence at the trial that the injuries sustained

by the plaintiff were not caused by any failure of duty on the part of the defendant, as owner of the vessel, in providing safe and sufficient equipment and appliances.

The railing of the *Bermuda* was in all respects properly constructed, and the plaintiff expressly disclaimed any ground of complaint in this respect.

Record, fols. 78, 79.

It was also established that at the time the plaintiff sustained the injuries complained of, she was not acting under the immediate order or direction of the master of the *Bermuda*, or of any other officer, or of any of the ship's company, but was engaged in the discharge of her customary duties, under her general orders, which included a direction that slops containing refuse should be thrown over the ship's side (*fols. 47–49*).

It was also established that the accident by which the plaintiff received the injuries complained of was solely due to the negligence of one, or of two, of the ship's company, to wit: the ship's carpenter and the ship's porter, in not properly replacing the rails of one of the gangways of the *Bermuda*, which had been properly lowered for the discharge of passengers' baggage, but which had not been properly replaced; the negligence consisting, as the learned Judge charged the jury, in "so handling the rails that instead of putting the hooks "through the eyes they were allowed to remain negli- "gently resting upon the eye, so that a pressure upon "them would force them out."

Second Point.—It thus affirmatively appeared that the injuries to the plaintiff were caused solely by the negligence of a fellow servant, or servants, in a common employment, without any violation or omission of duty on the part of the employer contributing to such injuries, and also that neither of such fellow servants stood in any such relation to the plaintiff, or to the work done by her and in the course of which her injuries

were sustained, as to constitute him the representative or *alter ego* of the employer, and to make his negligence the negligence of the employer.

The case, therefore, falls within the rule which exempts an employer from liability for injuries to a servant caused by the negligence of a fellow servant, and does not fall within the exceptions to the rule depriving the employer of the exemption when his own negligence contributes to the injury, or when the fellow servant occupies such a relation to the injured party or to the work in the course of which the injury was received as to make his negligence the negligence of the employer.

Both the rule and the exceptions are firmly established in this Court, as well as in the State Courts and in England.

Hough vs. *Railway Co.*, 100 U. S., 213.
Chicago & Milwaukee R'way Co. vs. *Ross*, 112 U. S., 377.
Tuttle vs. *Milwaukee Railway Co.*, 122 U. S., 189.
Northern Pacific R. R. Co. vs. *Mares*, 123 U. S., 710.
Priestly vs. *Towle*, 3 M. & W., 1.
Hutchinson vs. *York River R. R. Co.*, 5 Exch., 343.
Murray vs. *So. Car. R. R. Co.*, 1 McCullom, 385.
Farwell vs. *Boston & Worcester R. R. Co.*, 4 Met., 9.
Coon vs. *Syracuse & Rochester R. R. Co.*, 6 Barb., 231, *affirmed*, 5 N. Y., 492.
Flike vs. *Boston & Albany R. R. Co.*, 53 N. Y., 549.

Third Point.—It is well settled that one who enters the service of another for the performance of

specified duties takes upon himself the natural and ordinary risks incident to the performance of such duties, and among these risks are the carelessness and negligence of fellow servants in the course of the common employment.

Farwell vs. *Boston & W. R. R. Co.*, 4 Met., 49.
Hough vs. *Railway Co.*, 100 U. S., 213.
Railroad Co. vs. *Fort*, 17 Wall., 553.

In the case last cited, the Court say (*p.* 557): "the "rule proceeds on the theory that, that the employee, "in entering the service of the principal, is presumed "to take upon himself the risks incident to the under- "taking, among which are to be counted the negli- "gence of fellow servants in the same employment."

Fourth Point.—In the case at bar, the accident causing the injuries which the plaintiff sustained were not only due, solely, to the negligence of her fellow servants, but the negligence itself was one of the incidental risks of her employment on a sea-going, coastwise vessel. One of these risks was the careless or negligent fastening by the seamen of the guards or railings on the ship's side. On the undisputed facts, the defendant was therefore exempt from liability.

In *Quinn* vs. *N. J. Lighterage Co.*, 23 Bltchf., 209, the plaintiff was injured by the negligence of the master of a barge owned by the defendant while engaged in loading the vessel with iron rails, which were hoisted by tongs hooked on to the rails and moved by a hand winch. At the time of the accident, the captain was at the tongs and the plaintiff had hold of the rails, helping to push and guide them as they were hoisted. The master gave the order to hoist prematurely, and one of the rails fell on the plaintiff, causing injuries for which he brought suit. At the trial, the Court held that the negligence of the master was the negligence of the owner

of the barge, and so instructed the jury. The Circuit Court granted a new trial, holding that the master, at the time of the accident, was not performing a captain's duty, but simply that of a common laborer, and that the plaintiff had "no more ground of complaint than he "would have had if he had been injured by the care- "lessness of his fellow laborers. It was the act of a "co-servant, and among the risks incident to the em- "ployment which the plaintiff impliedly assumed when "he engaged in the work" (*p. 215*).

In *Hudson* vs. *Ocean Steamship Co.*, 110 N. Y., 625, the plaintiff, while wheeling freight from a dock in New York into defendant's steamship, over a platform or "skid," which was in good order but was held fast by ropes which were required to be shortened or lengthened as the tide rose or fell, by some omission of the men engaged about the work to attend properly to the fastenings, thereby causing the "skid" to fall, was precipitated into the water and injured.

The Court held, affirming a judgment in favor of the defendant, that the employer was exempt. They say:

"No fault or neglect was shown on defendant's part. "The principle upon which actions are allowed against "a master by his servant is the obligation resting upon "the former to provide adequate and safe appliances, "and such as are usual in the particular business in "which the servant is employed. That is a duty im- "plied from their contract, and failure of the master in "that duty renders him responsible to his servant for "injuries occurring. But if the master has performed "his duty in that respect, the servant takes all the "risks involved in the work in which he is engaged, "and of his own and his fellow servant's negligence."

Fifth Point.—The ship's carpenter and the ship's porter were fellow-servants of the plaintiff.

It was proved that the plaintiff had shipped as stewardess, and signed the shipping articles. She was one of the ship's company, and had, as such, participated

in an award of salvage made to the *Bermuda* (*fols. 80–81*).

By the maritime law, the sailing and management of freight and passenger vessel on a voyage constitute one entire venture; the common object is the successful performance and completion of the voyage. The shipping articles are required by law to be signed by the entire crew, and, in this case, they were so signed by the plaintiff as well as by the carpenter and porter and all the ship's company (*fol. 149*). A woman serving on a ship is entitled to all the rights, and subject to all the duties and risks of a seaman.

2 Parsons on Shipping & Ad., 49.
The Java & Matilda, 1 Hogg Adm., 187.
U. S. Rev. Stats., §§ 4511, 4512.

The sole command of the vessel was in the master. Acting under him, the subordinate officers of the ship exercised his authority, and to the extent of such exercise might well be held to represent the owners, but the ship's company were all fellow-servants, and in their acts in the course of the common employment, which was the navigation and care of the vessel, they were all on an equal footing, and all alike took the risks of the acts of their fellows.

Sixth Point.—There was nothing in the case to warrant the distinction pressed upon the learned Judge at the trial, and which he hesitatingly accepted, that because the stewardess and the porter served in the cabin, and the carpenter served on deck, therefore, the carpenter's negligence could be visited upon the owner, while the porter's could not.

This distinction was wholly unwarranted, and was, we submit, clearly error.

Exemption from liability for negligence of a fellow-servant is denied to an employer, only when the case shows that he ought to be held liable because of some duty omitted which was *his* duty and could not be

shifted or delegated to a subordinate, or because the negligent servant causing the injury stood in such attitude in relation to the injured servant, that the employer ought, in justice, to respond for the negligent act.

Neither element of responsibility existed in the case at bar.

There was no failure of duty on the part of defendant as to the equipment of the vessel, and the carpenter, as one of the ship's company, stood in no relation to the plaintiff except that of fellow-servant. He had no charge or control as to her duties or their performance, and had not assumed any such charge or control, and the case is wholly bare of anything from which the slightest imputation of negligence to the defendant can be derived. The carpenter was in no conceivable sense the representative or *alter ego* of the shipowner, or the delegate of any authority from the owner in performing the careless act of not securing the rails of the ship's gangway.

Seventh Point.—The error at the trial arose from a misapprehension of the case cited and relied upon by the plaintiff's counsel, *Chicago & Milwaukee R'way Co.* vs. *Ross* (112 U. S., 377), where the Court held the railway company liable for the injuries sustained by an engineer in its employ by a collision. At the time of the collision, the plaintiff was engineer of a freight train, and had the right of way over gravel trains, except when otherwise ordered. The conductor of the train had the entire charge of running it. It was his duty, under the company's regulations, to show to the engineer all orders received by him as to the running of the train. On the morning of the collision, a "wild train," carrying gravel, not running on schedule time, was coming on the track, and the conductor, though informed by telegraph of its coming and ordered to hold the freight train, neglected to deliver the order to the plaintiff, and

this negligence was the direct cause of the collision and of the injuries to the plaintiff.

The refusal of the Court to exempt the employer in the case last cited was clearly stated in the opinion to rest upon the "distinction to be made between servants "of a corporation exercising no supervision over others "engaged with them in the same employment, and "agents of the corporation clothed with the control and "management of a distinct department in which their "duty is entirely that of direction and superintendence. "A conductor, having the entire charge, control and "management of a railway train, occupies a very dif- "ferent position from the brakemen, the porters and "other subordinates employed. * * * In no proper "sense is he a fellow-servant with the firemen, the "brakemen, the porters and the engineer. The latter "are fellow-servants in the running of the train under "his direction; as to them and the train, he stands in "the place of, and represents, the corporation" (p. 390).

The same distinction was made in the coal company cases in the House of Lords (3 MacQueen, H. L. Cases, 266). The persons injured were miners working in a coalpit, and the person causing the injuries was a fellow-servant employed, not as a miner, but as engineer to take charge of the engine by which the miners were let down into the mine and brought out, and the coal was raised which they dug out. His negligence in the discharge of his duty in this separate department of the service, which made him responsible for the safe hoisting and lowering of the miners, was held to be the negligence of the employer.

So, too, in the numerous cases in which railroad companies have been held liable for the negligence of one servant in their employ causing injuries to a fellow-servant, the ground of liability has invariably been that as to the particular act causing the injury, the negligent party, although a fellow-servant, was, *pro hac vice*, clothed with or exercising the power of the corporation and, therefore, representing it, and not acting as a mere servant on the same footing as his fellow-servant.

Brickner Adx. vs. *N. Y. Central & H. R. R. R. Co.*, 2 Lansing, 506, affirmed 49 N. Y., 672.

In the case last cited, plaintiff's intestate, employed by the railroad company as a carpenter, was improperly directed by the foreman of his gang, one Westman, to go on to a defective scaffold, which gave way, causing his death. The Court held that it was error to non suit the plaintiff on the ground was that the negligence was that of a fellow-servant, because the "directing power" (*p.* 510) was the foreman Westman, who was "boss of the gang of carpenters," and, as such, was in the performance of executive acts, and "not while in the performance of these executive duties only the equal of the common colaborer or servant" (*p.* 517).

Laning vs. *N. Y. C. & H. R. R. Co.*, 49 N. Y., 521, was another case arising out of the giving way of the same scaffold as in the Brickner case just cited above, and the Court held the defendant liable because it appeared that Westman, the "boss of the gang"—as he was described by Laning (*p.* 510)—was incompetent (*p.* 534), and that in the capacity in which he was acting, he was the general agent and representative of the defendant, and not a mere fellow-servant with the others charged with some special duty.

And in *Flick* vs. *Boston & Albany R. R. Co.*, 53 N. Y., 549, the same distinction is applied. There, the plaintiff's intestate was a fireman on a freight train, and was killed by a collision, near Albany, of his train with another freight train which had become accidentally detached, and ran back, owing to want of a sufficient number of brakemen. The railroad company had an agent at Albany, called a "head conductor," whose business it "was to make up the morning trains, station the brake-"men, and generally to prepare and dispatch these "trains" (*p.* 567). Held, that the head conductor was not merely a co-servant engaged in the common business, but was in general charge of the business of the corporation as to making up and dispatching the train which caused this injury, and, in this agency "represented the corporation itself."

On the other hand, where the negligence is that of a fellow-servant not occupying a position which makes him the representative of the employer as to the servant injured, and the employer has fulfilled his duty, the employer is exempt from liability.

Hickey vs. *Taaffe*, 105 N. Y., 26.
Anthony vs. *Leeret*, Id. 591.
Crispin vs. *Babbitt*, 81 N. Y., 516.
Cahill vs. *Hilton*, 106 N. Y., 512.
Brick vs. *R. R. Co.*, 98 N. Y., 211.
Powers vs. *R. R. Co.*, Id. 274.
Mackin vs. *R. R. Co.*, 135 Mass., 210.
Hodgkin vs. *R. R. Co.*, 119 Id., 419.
Webber vs. *Piper*, 109 N. Y., 496.

The limitation of the rule of exemption under the distinction thus applied has no possible bearing on the case at bar. The use of he word "departments," occurring in the opinion and in the citations which it makes from adjudged cases (*see pp. 385, 388, 389, 392*), and the use of the same word in Captain Whitehurst's testimony (*fol. 80*), seem to have led to misapprehension on the part of the Court below. The master, in describing the several classes of the ship's company, used the words "deck department, engineer's department and steward's department," in the sense of classifying the ship's company as to their work, but not at all as intending to designate any division as respects superiority in grade, power of direction, or representation of the ship owner. He expressly testified that he commanded the whole vessel (*fol. 80*). The reference to departments in the opinion in the Ross case is manifestly to separate departments of service over which subordinate officers have superintendence (*p. 392*), or where the peculiar work of a particular department of the common employment is so foreign to that of a servant in the same employ that he is a stranger to it (*p. 388*).

Here the carpenter was not acting as carpenter, but simply as deck hand, and it is impossible to impute his carelessness to the owner any more than that of the por-

ter who was acting with him, both doing the same thing at the same time, and doing it ineffectually.

To hold that these two employees were not fellow-servants in the common service of the vessel would be to refine the rule of law to such an extent as to destroy it.

In order that two workmen should be fellow-servants it is not necessary that both should be engaged in performing the same or similar acts. They need not be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes.

See *Buckley & Gould* vs. *Curry Silver Mining Co., 14 Fed. Rep., 833, and cases cited; also note pages 840, 841, 846, where many cases are collated.*

Holden vs. *Fitchburg R. R., 129 Mass., 268.*

Lehigh Valley Coal Co. vs. *Jones, 86 Penn., 432.*

In the *Harold*, 21 Fed. Rep., 428, it was held that a winch man, furnished by the ship, was a fellow-servant of the employee of a stevedore who was at work shifting coal, as they were both in the common service of the ship and co-laborers in the same undertaking.

In *Armour* vs. *Hahn, 111 U. S., 313*, where a carpenter was injured, the Court says: "If it" (the stick of timber causing the injury) "was at the time insecure, it was either by reason of the risks ordinarily incident to the state of things in the unfinished condition of the buildings; or else by reason of some negligence of one of the carpenters or bricklayers, all of whom were employed and paid by the same master, and were working in the course of their employment at the same time and place, with an immediate common object, the erection of the building, and therefore, within the strictest limits of the rule of law on that subject, fellow-servants, one of whom cannot maintain an action for injuries caused by the negligence of another against their common master."

The *City of Alexandria, 17 Fed. Rep., 390*, is quite similar to the one at bar. The cook of a steamer was injured by falling down an open hatchway. The Court held that the negligence was that of the officers or men in the performance of their ordinary duties, against which the owners could not possibly guard; that the persons on board were in one common employment; that they were all engaged in the furtherance of a common object, viz.: the prosecution of the voyage, and that the libellant's claim could not, on common law principles, be sustained.

The authorities above cited, and the decisions to which they refer, and which it is unnecessary to discuss or analyze at length, establish the proposition that in order to relieve the master from liability where one servant is injured through the negligence of a co-servant, the two servants must be co-operating in the same business so that the one knows that the employment of the other is one of the incidents of this common service; that the work need not be one in which the immediate object is common; and that it is enough if the servants are employed to effect a common *general* object.

See also *Wharton on Negligence*, § *231.*

Here, the plaintiff and the carpenter were employed to effect a common general object, viz.: The care and management of a steam vessel and the transportation of passengers and freight. The plaintiff knew that on such a steamer there would be sailors, engineers, porters and carpenters. She knew that the employment of such fellow-servants was one of the incidents of their common service, and that if she undertook the duties of stewardess, she would be exposed to such dangers as might arise from their negligent acts. This is the test. "Where the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be supposed to have taken the risks of such possible carelessness when they entered the service, and must be regarded as fellow-servants." There being no question about relative ranks, and no suggestion that

the carpenter had any power to direct or control the stewardess, the two stood upon the same level. The carpenter's "department" was no more a different department from that of the stewardess than from that of the sailors, or of the engineers; and hers was no more different from the carpenter's than from that of the porter, who was conceded to be her fellow-servant. Their *immediate* objects were different, but their general object the same.

Chic. & Alton R. R. vs. *Murphy, 53 Ill., 336.*

If, for example, in the management of a hotel there were several so-called departments—kitchen, waiters, upstairs departments—and a waiter should be injured by the negligence of an employee in the upstairs department, it would be no answer to the defendant's contention to say that the mere technical division defeated the rule.

In *Morgan* vs. *Vale of Neath Ry. Co., L. R., 1 Q. B. Cases, 149*, the Queen's Bench decided that the rule of exemption applies in cases where, although the immediate object on which the one servant is employed, is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which have to be considered in his wages. Thus, whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such employment and within the rule. A carpenter who was injured by the negligence of a porter was held to be a fellow-servant of the latter, and the common master was relieved from liability.

Eighth Point.—The supposed conflict of decision between this Court and the Court of last resort in New York on the question of liability where the employee causing the injury is of a *higher grade* or in an entirely different sphere of employment, does not apply to the case at bar. As to this particular point the Court of Appeals say, in *Loughlin* vs. *State of N. Y.*, 105 N. Y., 159, *p.* 164, that the Ross case, 112 U. S., 377, "is in conflict with the course of decision in New York and elsewhere," citing *Slater* vs. *Jewett*, 85 N. Y., 61; *Wilson* vs. *Merry*, L. R. 1, H. L. cas., 326; *Farwell* vs. *Boston & W. R. R. Co.*, 4 Met., 49.

In the case in 105 N. Y., the injury was caused by the negligence of the master, and the servant injured *was engaged at the time in executing his orders*, while here the ship's carpenter had no control or direction, and was doing the work of a common hand.

There is no case to be found since the introduction of the rule of a master's exemption from liability for the negligence of a fellow servant which warrants the placing of the responsibility upon the present plaintiff in error for the injuries sustained by the plaintiff below.

In *Garrahy* vs. *Railroad Co.*, 25 Fed. Rep., 258, a common hand engaged in distributing rails along the side of a railroad track, for relaying it. was held not to be in the common employment of the railroad company with a man controlling and managing a switch engine not used in carrying these rails but in moving cars not engaged in the business of the relaying the track. These were strangers to each other and not fellow servants, and so the rule of exemption was held not to apply.

But in the well considered case of *Howard* vs. *Denver & Rio Grande R. R. Co.*, 26 Fed. Rep., 837, the rule was applied when an engineer and a foreman were employed in the movement of different trains, and see also *Mealman* vs. *Union Pac. Ry. Co.*, 37 Fed. Rep., 189.

Ninth Point.—There is not a scintilla of evidence in the case at bar which establishes any difference in the *grade of service* performed by the several classes or departments of the service on the ship.

There were, of course, different classes or departments of service in the common employment, the carpenter did not do the cooking and the able seaman did not work in the cabin pantries, but the necessary division of labor created no element in the employment or service of the ship's carpenter which made him any more the representative of the owner than did the employment and service of the stewardess make her the representative of the owner. If, for example, she had thrown the orange peelings and slops on the deck instead of over the side and the carpenter had slipped on them and fallen and broken his leg or arm, could she, with any reason, have been said to be the representative of the owners in that negligent act because she was doing a separate kind of work on the ship from that which the carpenter did? And yet if the theory of "departments" is to make the defendant liable to the stewardess for the carpenter's negligence about the rails, they would have been equally liable to the carpenter for the negligence of the stewardess in the case supposed.

The Court is referred, in addition, to the following authorities where the question of common employment is determined:

Brakeman and laborer:

Henry vs. *Staten Island Ry. Co.*, 81 N. Y., 373.

Car inspector and brakeman:

Smith vs. *Potter*, 46 Mich., 258.

See also:

Kidwell vs. *Houston & G. N. Ry. Co.*, 3 Woods, 313.

Engine driver and car repairer:

Valtex vs. *O. & M. R. R.* 85 Ill., 500.

Engine driver and laborer:

Kumler vs. *Junction R. R.*, 33 Ohio, 150.

Engine driver and switchman:

Smith vs. *M. & L. R. R. R.*. 18 Fed. Rep., 304.

See also 1 *Thompson on Negligence*, *p.* 1034–1037, and particularly the remarks of Hillyer, *J.*, quoted on page 1037.

Tenth Point.—The learned Judge at the Circuit therefore erred in permitting the introduction into the case as an element of inquiry or of decision the question whether the ship's carpenter belonged to a different "department" of the common service of the ship, the fact that this error was due to a misapprehension of the meaning and extent of the decision of this Court in the Ross case is further apparent from his disposition of the motion for a new trial.

In deciding that motion he said (*Opinion, fol. 90*):

"The motion, at the close of the evidence, to direct a "verdict for the defendant was necessarily decided "without an opportunity for that full and careful ex- "amination which its importance demanded. The "decision of the Supreme Court, in Ross *vs.* The Chicago, "Milwaukee and St. Paul Railway Co. (112 U. S., 377), "had been but recently announced, and in view of "the reasoning of the Court in that case and in the cases "cited with approval in the prevailing opinion, and in "view, also, of the evident disposition in many of the "Federal Circuits to relax the rule invoked by the de- "fendant, it was thought that the wisest course to adopt, "under all the circumstances, was to submit the cause "to the jury. The Court, at the trial, entertained very "grave doubt as to the plaintiff's right to recover, "and now, after re-reading the opinion in the Ross "case, and after a more thorough review of the au- "thorities, that doubt is still present."

He further said :

" Without intending to enter upon a discussion of " the subject, it suffices to say that the question in the " case at bar is involved in doubt. How it will ulti- " mately be disposed of cannot be foretold with cer- " tainty. The case will, in any event, be taken to the " Supreme Court. It is a case which should go there. " The record now before the Court is in proper form " to present to the appellate tribunal the question for " review.

" If the motion is granted there must be a new trial, " resulting in a verdict for the defendant. Should the " Supreme Court thereafter decide that there was error " in the direction of a verdict for the defendant, still " another trial must be had. It would seem for the " advantage of both parties that delay so unnecessary " should be avoided and expense so needless should not " be incurred. Upon the present record the action of " the Supreme Court will be final.

" The motion should, therefore, be denied, but upon " the condition, of course, that the plaintiff enter " judgment for the full amount of her recovery, and " interest."

Eleventh Point.—If the above propositions are sound, there was nothing to submit to the jury, and a verdict should have been directed for the defendant.

Technically, the exception taken at fol. 81 to the refusal of the Court to direct a verdict for defendant should have separately stated in respect to the ground that the injury was caused by a fellow-servant, but it is clear from the whole record that this ground of the motion and the exception to the refusal to grant it was considered separately and ruled upon separately. The opinion of the Court on the motion for a new trial shows this, and the disposition made by the Court of that motion was equivalent to a direction that the case should be placed in such a situation that it could be taken by writ of error to this Court to review this precise question.

However this may be, the question is fully brought

up for review in the exception to the charge of the Court at fol. 87, where the precise point was made and exception duly taken to the Court's leaving to the jury any question as to whether the accident was occasioned through the negligence of a servant in a different department.

Twelfth Point.—The judgment should be reversed and a new trial ordered.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Plaintiff in Error.

WILLIAM ALLEN BUTLER,
WILHELMUS MYNDERSE,
Of Counsel.

WITHDRAWN

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 264.

THE QUEBEC STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

BARBARA MERCHANT.
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

A. J. DITTENHOEFER,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE QUEBEC STEAMSHIP COMPANY,
Plaintiff in Error,

AGAINST

BARBARA MERCHANT,
Defendant in Error.

No. 264.

Brief For Defendant in Error.

Points.

First Point.—As the verdict does not exceed five thousand dollars this Court has no jurisdiction.

The verdict was for five thousand dollars to which, upon entering judgment, interest and costs were added (fol. 41). Interest is included in every judgment from the time of its rendition to its entry, and may be taxed by the clerk as a part of the costs. If this Court can acquire jurisdiction in this way a ready means is furnished for evading the statute, limiting its jurisdiction to cases involving more than five thousand dollars.

Merrill *v.* Petty, 16 Wall., 338-345,
Walker, *v.* U. S., 4 *id.*, 163.
First National Bank *v.* Redick, 110 U. S., 224.
Western Union Tel. Co. *v.* Rogers, 93 *id.*, 565.

The Court below manifestly intended that this case should be reviewed by this Court, but, that it may not be said by defendant in error that this point was either overlooked or entirely ignored, it is deemed proper to suggest it without intending to press the same upon the Court.

Second Point.—In the same spirit it is suggested that the exceptions do not raise any question for consideration by this Court. The exception at folio 81 was general to the rulings of the Court upon two propositions, as to one of which confessedly the Court properly ruled, and is not assigned as error.

The Court having overruled the motion to dismiss the complaint, to which ruling there was no proper exception, it was bound to submit the case to the jury, and therefore the exception, folio 87, is untenable. In other words, by making an improper exception to the denial of the motion to dismiss the complaint, the defendant occupies the same position as though no exception had been taken at all, and it is too late to raise the question by an exception to the charge leaving the case to the jury.

Third Point.—The Court properly charged the jury that the master was liable if they found that the accident occurred through the negligence of a servant in a department distinct and separate from that in which the plaintiff was engaged.

(*a.*) It appeared in evidence that there were three separate and distinct departments on board the Bermuda: the deck department, engineers' department and stewards' department (fol. 80).

The witness Conway testified—and was not contradicted—that the carpenter or second mate of the deck department had charge of the opening and closing of the

gangway through which plaintiff fell (fol. 66). The court charged the jury very carefully in relation to the testimony concerning the different departments on board the vessel, and left it to them to determine whether the carpenter was a servant in a totally different department from that of the plaintiff, telling them that they could not find for her unless they were satisfied by a fair preponderance of evidence that the accident occurred through the negligence of a servant in a totally different and distinct department (fol. 83).

(*b.*) The exemption of the master from liability to a servant for the negligence of a fellow servant is founded upon the theory that the servant impliedly assumes the risk of the negligence of a servant co-operating with him. Servants in the same line of employment where their general duties must bring them habitually together are enabled to exercise a mutual influence upon each other promotive of proper caution. But that rule does not obtain where the servants are in departments essentially foreign to each other though having a common master.

Whatever conflict may exist among the State courts upon the master's liability for the acts of the servant, the most recent and carefully considered decisions of the Federal Courts have firmly adopted the humane doctrine that the master's immunity from damages for injuries sustained by one employee through the negligence of another is limited to cases where the servants are engaged in the same common employment in the *same department* of *duty*, and does not extend to cases where servants are engaged in departments essentially foreign to each other.

3 Abb. Nat. Dig., 202-3 and cases cited.
Gravelle *v.* Minneapolis & St. L. Ry. Co., 10 Fed. Rep., 711.
Same case, 11 *Id.*, 569.
King *v.* Ohio Railroad Co., 14 *Id.*, 277.
Crew *v.* St. Louis Ry. Co., 20 *Id.*, 87.

The Titan, 23 *Id.*, 413.
Garrahy *v.* K. C. St. J. & C. B. R. R. Co., 25 *Id.*, 258.
Kenna *v.* Carolina, 30 *Id.*, 197.
Central Trust Co. *v.* Wabash Co., 34 *Id.*, 616.
C. M. & St. P. Ry. Co. *v.* Ross, 112 U. S., 389.
Northern Pacific Ry. Co. *v.* Herbert, 116 *Id.*, 642.
Armand S. S. Co. *v.* Carey, 119 *Id.*, 245.

The only apparent conflict in the cases arises from the difficulty of determining whether the facts of the particular case before the Court establish the employment of the servants in departments foreign to each other. In the case at bar, however, no such difficulty exists, for the Court submitted that question as one of fact to be determined by the jury. The defendants were thus given the benefit of every doubt and upon a charge which was most unexceptionable. So that we have in this case, a finding that the negligent servant was engaged in a department totally foreign to that in which plaintiff was engaged.

Fourth Point.—"Where a servant is injured in consequence of the negligence of another servant of the same master it is proper to submit to the jury, as a matter of fact, whether the plaintiff and such other servant were in the same line of employment."

Toledo W. & W. R. R. Co. *v.* Moore, 77 Ill., 217.
C. B. & Q. R. R. Co. *v.* Gregory, 58 *Id.*, 272.
Indianapolis & St. Louis Co. *v.* Morganstern, 106 *Id.*, 216.

While one master may carry on his business in such a way as not to create a departmental distinction, another may so arrange it that one servant would not, within the established rule, be considered a fellow servant with another whose negligence is complained of.

It depends upon the peculiar facts of each case, such as the character of the employment, the nature of the business, and the manner in which it is conducted. In the case at bar the defendant's witness, Captain Whitehurst, was very precise in specifying the different departments on board the vessel, and while the learned counsel for the defendant cavils at the use of the term "department" as employed by the captain, and suggest that he meant simply the different "classes" on board the vessel, we find all the witnesses examined upon the subject, though their testimony was taken at different times and places, make the same distinction and use the same phrase. John Conway, whose testimony was taken on behalf of the plaintiff *before trial*, stated that the captain or second mate of the *deck department* had charge of the opening and closing of the gangway (66), and Robert West, examined on behalf of the *defendants before trial*, speaks of the porter as being in the *steward's department* (72).

The plaintiff had nothing whatever to do with the navigation of the vessel, and occupied toward the carpenter, who belonged to the deck department, substantially the position that a valet would occupy to the captain, if he had one, the plaintiff was but a ladies' maid.

In view, however, of the finding of the jury, it is unnecessary to further consider this suggestion of counsel.

Fifth Point.—But even if it be a question for the determination of the Court and not for the jury, the plaintiff in error was not injured by its submission, and cannot complain, as the Court made no error in the propositions of law embraced in the charge submitting the case to the jury.

Toledo, W. & W. R. R. Co. *v.* Moore (*supra*, p. 222).

Sixth Point.—If the trial judge would, upon the evidence, have been authorized to determine this question without submitting it to the jury, he would have been obliged as matter of law to hold that the carpenter and plaintiff were not fellow servants.

The English rule relating to the exemption of a master from liability for an injury to a servant is that all servants of the same master engaged in carrying forward the common enterprise, whether in different departments, widely separated, or strictly subordinated to others are to be regarded as fellow servants, bound by the terms of their employment to run the hazard of any negligence of any of their number.

Redfield's Law of Railways, Vol. 1, Sec. 131.

In other words, where the general object to be accomplished by the servants are the same, the employer the same, and the servants derive authority and compensation from the same source, they are all, from the highest to the lowest, regarded by the English rule as fellow servants, no matter how remote from each other they may usually be occupied or how distinct in character and nature their respective duties and employments may be.

This broad rule has been followed in Massachusetts, (Holden *v.* Fitchburg R. R. Co., 129 Mass., 268,) and by a bare majority of the New York Court of Appeals in the leading case of Crispen *v.* Babbitt, 81 N. Y., 504. And the learned counsel for the plaintiff in error, seems to rely mainly upon the cases decided in England and those two States, including Loughlin *v.* New York, 105 N. Y.,64, in which attention is called to the conflict between the Federal Courts and the doctrine adopted by the New York Court of Appeals.

But this English rule has in its progress in the courts of England and America encountered constant resistance by the bar and many of the ablest jurists, and the reason

assigned for its adoption has been deemed inadequate and illogical.

Chicago & N. W. R'y Co., *v.* Maranda, 93 Ill., (p. 326).

And accordingly we find the rule departed from in the Federal Courts and in many of the States of the Union (See Quin *v.* The New York Lighterage Co., 23 Fed. Rep., p. 364; Chicago & N. W. R'y Co., *v.* Maranda, *supra*, and cases cited above.)

Recognizing such departure, the Court below, on the motion for a new trial, said that "the general tendency of "modern decisions is to abate the austerities of the rule "which exempts the master from liability from injuries "occasioned by the negligence of fellow servants and to "confine it within very narrow limits. In some of the "States it has been practically abrogated by judicial de-"cisions, in others by express statute. The railroad commis-"sioners of our State, (N. Y.), in an able review of the "subject, recommend action by the Legislature looking to "abandonment (Report for 1883 vol. 1, page 54.) In the "recent case of Garrahy *v.* K. C. St. J. & C. B. R'y (25 "Fed. Rep. 258), the rule is still further relaxed, if indeed "the logic of that decision is not to overthrow it altogether. "(91.)"

The English rule seems to have been abrogated by statute in 1880 See note 53 Am. Rep. 6

Seventh Point. "In order to constitute servants of "the same master fellow servants, it is not enough that "they are engaged in doing parts of the same work or "in the promotion of the same enterprise carried on by the "master not requiring co-operation, nor bringing the ser-"vants together or into such personal relations that they "could exercise an influence one upon the other, promo-"tive of proper caution in respect of their mutual safety, "but it is essential either that they should actually co-"operate at the time of the injury in the particular busi-

"ness in hand, or that their usual duties should bring "them into habitual consociation so that such proper cau- "tion would be likely to result.

C. &. N. W. R'y Co. *v.* Maranda (*supra*).

And so in the following cases in the Federal Courts it has been determined that as matter of law the servant injured was not a fellow servant with one whose neglect caused the accident:

Common laborer engaged in unloading vessel and officer of ship:

McKenna *v.* Carolina, 30 Id., 193-7.

Expressman and Engineer:

Central Trust Co. *v.* Wabash Co (*supra*).

Common workman and conductor of switch engine:

Garrahy *v.* Kansas City, &c. (*supra*).

So also station agent and carpenter:

Palmer *v.* Railway Co., 13 Pac. Rep., 425.

Laborer in carpenter shop and Engineer:

Ryan *v.* Railway Co., 60 Ill., 177.
See also Bain *v.* Athens Foundry and Machine Works, 75 Ga., 718.
Louisville, &c., Co. *v.* Moore, 83 Ky., 675-684.
Stroble *v.* Chicago, M. & St. Paul Co., 70 Iowa, 555.
Chicago, &c., Co. *v.* Hoyt, 122 Ill., 369.
East Tennessee V. & G. R. Co. *v.* Deaderick (Tenn.) 27 Alb. L. Journal 22 (1887)

Eighth Point.—In view of the decisions of the Federal Court, it would not be profitable to follow counsel in their citation of the cases in England, Massachusetts, or New York. Counsel seem to place some stress

upon the Illinois cases cited by them. But Chicago & Alton R. R. Co. *v.* Murphy (53 Ill., 336), was subsequently disapproved by the Courts of that State, as laying down the rule too broadly (C. & N. W. Ry. Co. *v.* Miranda, *supra*), and the doctrine of Valtez *v.* Ohio R. Co. (85 Ill., 500) has been overruled by the subsequent cases (see Wood's Master & Servant, p. 853, note 2d Ed. ; 98 Ill., 481; 101 id., 93 ; 104 id., 202 ; 106 id., 216.) The Miranda case was most carefully considered in an elaborate and able opinion, and is cited with approval and followed in Rolling Mill Co. *v.* Johnson (114 Ill., 57), and Chicago & N. W. Ry. Co. *v.* Snyder (117 Id., 376).

In Smith *v.* Potter (46 Mich., 258) cited by plaintiff in error, the Court held that the brakeman and inspector of cars, whose duty it was to see that the cars were in proper condition, were fellow servants as were also the conductor and brakeman. This is in direct conflict with the subsequently decided case of Chicago, &c., Co. *v.* Ross (*supra*).

The Federal cases cited by plaintiff in error sustain and point out the departmental distinction as an exception to the English doctrine.

In Howard *v.* Denver & Rio Grande R. R. Co., 26 Fed. Rep., 837, which counsel relies upon as a "well-considered case," Judge Brewer (page 841) says : "Another exception to a master's exemption from liability which has received considerable recognition, is that where two employees who are serving the same master are engaged in a DIFFERENT CLASS of work they are not to be regarded as fellow servants within the rule. Thus in Illinois it has been held that a bookkeeper in a railroad office is not a fellow servant with an engineer (Chicago, &c., Ry. Co. *v.* Keefe, 47 Ill., 110), and also that a laborer in a carpenter shop was not a fellow servant with an engineer (Ryan *v.* R. R. Co., 60 Ill., 177);" and the learned Judge refers with approval to the case of Garrahy *v.* R. R. Co. (*supra*).

Mealman *v.* Union Pacific R. R. Co. (37 Fed. Rep., 189), decided by the same Judge, came up on a demurrer to the

complaint, and the Court simply held that as the negligence charged was that of a master mechanic, whose duties the complaint did not set forth, there were not sufficient facts averred to hold the company liable.

In Bulckley *v.* Gould & Curry Silver Mining Company, 14 Fed. Rep., 833, plaintiff was engaged in a shaft, excavating the same and loading rock, while the negligent servant was running the engine employed in hoisting the rock from the shaft, and the decision was based solely upon the ground that they were engaged together in excavating the shaft as "fellow servants," in the same line or department of service (p. 836), and from the opinion it is clear that had it appeared that they were not engaged in the same "line or department of service," the decision would have been otherwise.

In Quinn *v.* the N. J. Lighterage Co. (*supra*), both men were engaged loading a barge with iron rail; two men were on the hand winch, one hooked the tongs upon the rail and two pushed and guided the rails into the barge when raised by the men at the winch,and through the negligence of the captain, who took the place of one of the men at the winch, the accident occurred and Judge Wallace in the opinion pointed out the departmental distinction created by the Federal Courts. Indeed, in the same volume (p. 413), we find that in passing upon the Titan case (*supra*), where the facts were more analogous to those at bar, he recognized and enforced that distinction by holding the master liable for an accident to a deck hand who was not engaged in the navigation of the vessel at the time of the accident which occurred through the fault of the pilot.

In the Harold case (21 Fed. Rep., 428) the libellant was one of a number of men engaged to shift coal in a steamer. He was at work in the hold beneath the aft hatch, emptying the tubs as they were lowered. The servant who attended to the winch started it without notice to the men at the platform, whereby one of the planks was displaced, fell through the hatch and injured libellant. The Court, in drawing the distinction between that case and the liabil-

ity of the master for negligence of a servant in a distinct and different department, stated, that "the risk of the negligence of servants or laborers, in any independent department of work" is not assumed by the servant. "Against these he has no means of protecting himself, nor can he be reasonably supposed to take the risk arising from a kind of work *wholly independent of that about which he is engaged.*"

The City of Alexandria, 17 Fed. Rep., 390, was decided before the Ross case, (*supra*), and the evidence showed the negligence of a fellow workman engaged in the same general undertaking or employment. They were the steward and cook working in the same department.

In Haugh *v.* R'y, 100 U. S., 213, the deceased was killed by reason of the engine on which he was riding being thrown from the track over an embankment, whereby the whistle fastened to the boiler was knocked out, which allowed hot water and steam to escape, scalding him to death. The question before the Court was whether proper machinery had been furnished the servant. A verdict for the defendant was reversed and the Court, in its opinion written by Mr. Justice Harlan (who subsequently concurred in the opinion of Mr. Justice Field in the Ross case), say, quoting from the authorities: "In the consideration of the case it did not become necessary to define with any degree of precision what was meant by the words 'common servants or common employment' and perhaps it might be difficult beforehand to suggest any strict definition of them. It is necessary, however, in each particular case to ascertain whether servants are fellow servants in the same work, because although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions *foreign* to his employment. Where the servants therefore are engaged in *different departments* of duty, an injury by one servant upon the other by carelessness or negligence, in the course

of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no relation to him."

In Armour *v.* Hahn, 111 U.S., 313, a number of carpenters and bricklayers were engaged in the erection of a building, and in arranging the joist for the edge of a cornice; the plaintiff (a carpenter) stood on the projecting part of one of the timbers causing it to tip over. The Court held that there was no evidence of negligence, because it was not pretended that the timber was unsound, and if it was insecure, it was by reason of the risks ordinarily incident to the state of things in the unfinished condition of the building, or else by reason of some negligence of one of the carpenters or bricklayers, all of whom were working in the course of their employment at the same place and time with an immediate common object and within the strictest limits of the rule of law upon the subject of fellow-servants.

Kendal *v.* Houston & Northern R. R. Co., 3 Wood, 313, was decided by the District Court of Texas in 1877 and came before the court upon a demurrer to a declaration which failed to allege that the car which caused the injury was defective. The Court stated that the rule in this country and in England was that the Master was liable for injury occasioned by the negligence of a fellow servant employed in the same general business, even though the negligent servant may have been superior to the one injured in his grade of employment, provided the company has in the first instance provided sufficient machinery and skillful and competent employees. This is no longer the law of the federal courts.

Smith *v.* Memphis, &c., R. R. Co., 17 Fed. Rep., 304, verdict for plaintiff was sustained. The proof imputed negligence to the defendant in not having a sufficiently safe road-bed and track, and in excessive speed of the locomotive (p. 305).

Ninth Point.—The learned counsel for plaintiff in error contend that the doctrine of the master's immunity from liability as maintained in the early State Court cases still exists in the Federal Courts, except in cases where the servants differ in rank, and urge that the reasoning of the Ross case should not be extended beyond that point Again, referring to the cases above cited for the prevailing doctrine in the Circuit and District Courts, we desire especially to call attention to the Garrahy case (25 Federal Rep., 258), decided by Mr. Justice Miller. In that case the plaintiff was engaged with a number of workmen under the control of a foreman in taking up and relaying one of the tracks in the yard of the company. In the yard there was a switch engine, usually employed in transferring cars from one track to another and from one place to another with several hands, including a fireman and engineer, under the control of a conductor. The switch engine struck plaintiff while he was engaged in replacing the rails of a track. The conductor of the switch engine was clearly not the superior of the servant injured, but the learned Judge says, in overruling a motion for a new trial, "After re-examining the matter * * * I remain of the opinion that a common hand engaged in the business of distributing iron rails along the side of a track, to be laid in place of other rails removed from that track, and under the control, with six or eight other men, of a boss or foreman, is not in the same employment as a man controlling and managing a switch engine not *used in carrying these rails*, but in moving and transferring from one place to another cars not engaged in the business of relaying said track. And this, in my personal judgment, as a matter of sound principle, *is also the necessary result of the latest decision of the Supreme Court of the United States on the same subject, in the case of C. M. & St. P. R'y. Co.* v. *Ross*, 112 *U. S.*, 377."

This breaking away from the rigorous and inequitable doctrine of some of the State Courts devolves upon the employer a duty and a just share of responsibility for the lives and limbs of the persons in his control, and is more in the direction of justice and humanity, "and the "poor laborer, who, under the old rule, was left to be driven "about by the winds of chance, stranded upon the shoals of "misfortune or wrecked upon the rocks of adversity, will be "better protected in his person and rights in the future."

25 Fed. Rep., 264, 265.

Tenth Point.—The judgment should be affirmed with costs.

A. J. DITTENHOEFER,
Of Counsel for Defendant in error.